JOHN T. FEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 232

ROBERT E. FUNKHOUSER AND ELEANOR E. FUNKHOUSER,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT E. FUNKHOUSER
Petitioner
5315 Colorado Avenue, N.W.
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Robert E. Funkhouser and Eleanor E. Funkhouser, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on April 9, 1956.

DECISIONS BELOW

The decision of the Tax Court of the United States is printed as Appendix A, infra.

The decision of the Court of Appeals for the Fourth Circuit is printed as Appendix B, infra.

The order of the Court of Appeals for the Fourth Circuit granting a rehearing is printed as Appendix C, infra; the rehearing was held on March 21, 1956 and the judgment of the Court was entered on April 9, 1956 and is printed as Appendix D, infra.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 7, 1955 (Appendix B).

Rehearing was granted on December 16, 1955 (Appendix C).

Rehearing was argued on March 21, 1956 and was denied on April 9, 1956 (Appendix D).

The jurisdiction of this Court is invoked under Title 28, Section 1254.

THE QUESTIONS INVOLVED

1. Did the Court of Appeals for the Fourth Circuit err in refusing to reverse the decision of the Tax Court which was based on a stipulation forced on Petitioners by duress, intimidation, impoverishment, threats, fear and coercion, without either Respondent or Petitioners knowing how much tax and penalties were being set up in the stipulation?

2. Did Respondent mislead the Court by misstating the facts?

3. Was Petitioners' constitutional rights to due process denied by this decision of the Tax Court which was based on this stipulation forced on Petitioners under conditions which Respondent had no right to make?

4. Did the Tax Court and the Court of Appeals for the Fourth Circuit err in refusing to set aside a judgment based on error in the assessment of these taxes and penalties?

STATEMENT OF THE CASE

The facts in the case are not in dispute. They are clearly stated by Respondent in his testimony before the Tax Court, the United States District Court for the District of Maryland, the Court of Appeals for the Fourth Circuit, and in Respondent's letters as set out in the Appendix hereto. They were clearly called to the attention of the Court below in the briefs filed in that Court, certified copies of which are attached to this petition.

THE FIRST QUESTION

This testimony shows that Respondent engaged in a seven year siege of coercion, intimidation, impoverishment and threats to force the signing of the stipulation. Without making any audit, calculation or tabulation (Appendix 31a-32.), list of the items disallowed (Appendix 61a.) count of the items (Pet. Br. 6.), or even any "attempt to analyze the listed items of expense" in Petitioner's income tax returns he would have to disallow for the assessment of any taxes (Appendix 56a.), and without making any assessment of any taxes, Respondent went into the United States District Court for the District of Maryland and had his agent "assume" that some taxes might be due (Appendix 45a.), and Respondent on that "assumption" had Petitioner fined $25,000.00 and sentenced to prison for the evasion of taxes which had never been assessed, calculated, or tabulated (Appendix 31a-32a.) and then after he had sent Petitioner to prison for the evasion of these taxes which had never been

assessed, calculated, tabulated, listed or the items involved even counted (Appendix 50a.) or analyzed (Appendix 50a.) he opposed Petitioner's release from the prison on parole after Petitioner had served enough time in prison to become eligible for parole, on the ground that Petitioner "had not paid his assessed taxes". (See record of Parole Board in Criminal Case No. 21794.)

Respondent then seized and took all of Petitioner's money from Petitioner's bank account, filed jeopardy assessments and tax liens on all of Petitioner's property, took and collected all of Petitioner's notes and money and repeatedly threatened to sell all of the property if the stipulation was not signed immediately (Appendix 55a, 62a).

Respondent then had Petitioner's counsel, who was permitted to represent Petitioner only on the permission, consent and approval of Respondent, sign the stipulation, and then Respondent took over the counsel and had the counsel appear as his (Respondent's) witness against Petitioner before the Tax Court (Appendix 58a-61a).

Petitioners Ask This Court to Review and Condemn This Coercion

This case was started nine years ago by one of Respondent's special agents who testified that he began it by working overtime and late into the night by following Petitioner about the streets of Washington, D. C., and the roads of Maryland for the purpose of "supplementing the family income" (Appendix 20a.) and that same special agent continued to work the case aggressively for the following seven years (Appendix 20a-21a, 48a). The special agent found that all gross income and all expenses were recorded in the income

tax returns as filed (Appendix 22a-31a.) but when his family income was not "satisfactorily supplemented" Respondent permitted him to spend the next three quarters of a decade forcing this settlement by the methods described by Respondent in his testimony in the record of the case, excerpts of which are printed in the briefs filed in the Court below and in the Appendix hereto.

Respondent's Testimony Shows That He Found That All Gross Income and All Expenses Were Reported in the Returns That Were Filed and That No Taxes or Penalties Were Properly or Legally Assessable

Respondent's Testimony Shows:

All Gross Income Was Reported

1. Respondent found that petitioners had filed Income Tax returns for each of the years in which they had reported all of their gross income. (Appendix 25a, 31a, 63a) and (Pet. Br. 4.)

All Expenses Were Reported

2. Respondent found that all expenses were reported and he told the Tax Court that he found that 95 per cent of those expenses were allowable and were allowed. He testified:

> "Every check that he was able to produce, and he produced 95 per cent of them, were itemized by numbers, were placed in various categories. Those were allowed. There was no question about it. They were allowed as deductions from Gross income". (Appendix 63a.)

3. Respondent told the Tax Court that he found the other five per cent of the listed expenses recorded in the books and records in minutest detail. (Appendix 24a-31a, 64a.) Respondent testified:

> "Finally it came to the questionable items. What did these items represent? They go from 25 cents up to $400.00—some in some cases. I honestly believe that there is at least 10,000 Income items in dispute in this case . . ." (Appendix 64a.)

4. Respondent testified that he made no audit, calculation or tabulation of the items in dispute (Appendix 31a-32a).

5. Respondent told the Tax Court that he made no attempt to analyze the questioned items of expense; he testified:

> "And realizing the enormity of attempting to analyze some 20 or 30 thousand individual items I told them (the boys) we would adopt the theory of the Cohen rule and split it down the middle". (Appendix 56a.)

6. Respondent made no inquiry about the particular items. He testified:

> "I did call his attention in the various interviews to the specific checks, but whether I did in this particular one, I am not sure, Your Honor." (Appendix 32a.)

7. Respondent never made up a list of the items he claimed to have disallowed and Respondent forced the signing of the stipulation and the Tax Court decision in this case without ever having any list of the items on which it was based. Respondent testified:

> "The government didn't give me any list; and as a matter of fact, they didn't have a list and didn't make it up and the settlement was finally effected as Mr. Butrum described it, by an arbitrary decision of these items in dispute. So I didn't have any list of them. I just had the figure". (Appendix 61a.)

8. Respondent testified before the Tax Court that he made no list, count, tabulation, calculation, or attempt to analyze the items he disallowed for the assessment of these taxes and penalties but that he just estimated them to number:

> "3,000 as estimated by Mr. Waring (Appendix 64a.)
> 7,000 as estimated by Mr. Butrum (Appendix 55a.)
> 10,000 as estimated by Mr. Waring (Appendix 64a.)
> 14,000 as estimated by Mr. Roberts (Appendix 62a.)
> 2 or 3 suitcases full as estimated by Mr. Luce (Appendix 59a.)
> 20 or 30 thousand items as estimated by Mr. Butrum" (Appendix 56a.)

9. Respondent testified before the Tax Court that he had disallowed whole columns of items without knowing why the columns were in there at all, as they were totally meaningless to him. He said:

> "Well I don't know why that column is in there at all. As a matter of fact; it is totally meaningless so far as our settlement was concerned. Whether you were or were not guilty of fraud with respect to the particular items in your Criminal Case was no concern to me in settling your Civil Tax liability". (Appendix 57a.)

10. Respondent testified that for the assessment of these taxes and penalties he just took some figures and applied what in his judgment he could get. He testified:

> "We take the total sum and apply in what in our judgment is a reasonable figure to apply". (Appendix 56a.)

11. Respondent testified that for the stipulation in this case he disallowed all the items questioned by his special agent. (Appendix 57a.)

And Respondent's Special Agent Testified That He Disallowed

a. All automobile expenses in the entirety (Appendix 33a.)

b. Items never expensed (Appendix 33a.)

c. Depreciable items without allowing any depreciation (Appendix 34a.)

d. Items disallowed without any reason (Appendix 41a-45a.)

e. Just assumed that some taxes were due (Appendix 45a.)

f. Set up a bogus list of disallowed items (Appendix 46a.)

And the Record Shows That the Special Agent Knowingly Testified Falsely as to:

a. The sale of some of the property. (Appendix 35a.)

b. Petitioner's contentions as to the use of some of the property. (Appendix 36a-41a.)

Petitioners Ask This Court to Please Review the Assessment of These Taxes and Penalties on This Basis. Petitioners Contend That No Taxes or Penalties Should be, or Can be, Legally Assessed as These Taxes and Penalties Have Been Assessed. Petitioners Ask This Court to Consider and Disapprove the Coercion Used by Respondent to Force the Signing of the Stipulation in This Case

THE SECOND QUESTION

Did Respondent mislead the Court below by misrepresenting the facts?

Petitioners petitioned the Court of Appeals for the Fourth Circuit to review the case on the ground that Respondent had made many mistakes in the assessment of the taxes and penalties and in the application of the money seized and taken by Respondent.

Respondent in his brief in opposition to a rehearing told the Court:

> "The difference of $7,657.47 between the amount of $32,487.97 seized and collected from taxpayers and the amount of $24,830.50 shown as having been paid by them in the stipulation for entry of the decision by the Tax Court consists entirely of interest assessed for the year 1941 in the amount of $2,626.67 and interest as finally determined for the year 1942 in the amount of $5,030.80. These two items of interest total exactly $7,657.47, the amount of the alleged discrepancy." (Res. Br. in opposition to rehearing pages 2-3.)

That contention by Respondent is proved to be untrue by his own "Statement of Accounts" as set out at the top of page 14 of that same brief. In that statement Respondent shows that there were discrepancies made in his application of the seized money in each and every one of the years. And they do not agree with the figures Respondent set out in the stipulation. And the Respondent admits that he made mistakes in the application of the seized money in each and every one of the years, he says on page 12 of that same brief:

> "This statement indicates that the taxpayers have made a net overpayment of interest for the period involved to the extent of $990.31. It will be noted that in some years the taxpayers have underpaid the interest required to be imposed on them by statute and that in other years they have overpaid such interest." (Res. brief in opposition to rehearing page 12.)

Respondent's statement to the Court below that the discrepancy in the credit of the seized money as set out in the stipulation was exactly $7,657.47 and applied to interest in the years 1941 and 1942 is also proved untrue by his disgorging the sum of $842.15 for the year 1943 as shown on the photostat of Respondent's refund check of February 8, 1956. (Appendix page 20 of Petitioner's reply brief to petition for rehearing before the Court of Appeals.) Copy of which is certified and attached hereto.

Respondent repeatedly told the Tax Court and the Court below that he had supplied Petitioner with full information as to how these taxes and penalties had been assessed and how the figures for the stipulation had been arrived at. (Appendix 49a.) This also is proved untrue by Respondent's testimony before the Tax Court when he testified:

> Q. By Mr. Funkhouser: Did you ever give me a list of any of the items disallowed in this case?
> A. By Mr. Butrum: Mr. Funkhouser, I told you a number of times we did not give you any; neither do we intend to. (Appendix 50a.)
> Q. By Mr. Funkhouser: Have you ever given me any items?
> A. By Mr. Butrum: I have not given you any list of any items. (Appendix 51a.)

Respondent Had Never Made Up Any List of the Items He Would Have to Disallow for the Assessment of Any Taxes

> Q. By Mr. Funkhouser: Did you ever give me any list of the items that were disallowed in this case?
>
> A. By Mr. Luce: Mr. Funkhouser, I never had a list . . . the government didn't give me any list; and as a matter of fact, they didn't have a list and didn't make it up . . ." (Appendix 61a.)

Petitioners contend that no taxes and penalties could properly be assessed on that basis and they ask this Court to reverse the decision of the Court below which affirmed the decision of the Tax Court which had made such an assessment.

And Petitioners ask this Court to disapprove these methods used by Respondent to force the counsel to sign the stipulation in this case.

Petitioners contend that when they filed income tax returns in which they reported all of their gross income and all of their expenses they complied with the requirements of the Internal Revenue Code and they should not thereafter be subjected to a fine, imprisonment, the seizure and taking of all of their property and money; a dozen different claims for a dozen different amounts claimed (Pet. Br. 38-39.) many years of coercion and impoverishment, threats to sell the property and break Petitioner (Appendix 61a). All of which was done by Respondent to force the settlement by the stipulation complained of.

THE THIRD QUESTION

Was Petitioners' constitutional rights to due process denied by this decision of the Tax Court which was based on a stipulation forced on Petitioners' counsel under conditions which Respondent had no right to make?

Petitioners contend that they filed income tax returns for all of the years involved in which they reported all of their gross income and all of their expenses. (Appendix 25a, 31a, 33a.) That they had a right to believe that those income tax returns were satisfactory, and complied with all of the requirements of the Internal Revenue Laws. That they had filed similar

returns for many years exactly like these returns and Respondent had examined many of those returns and had approved them (Appendix 9a-19a).

Now, here, in this case Respondent has found all gross income and all expenses reported and has found that 95 per cent of all of the expenses were allowable and they were allowed (Appendix 63a.) and the other 5 per cent of the expenses were listed in such great detail in the books and records that they were not audited, calculated or tabulated (Appendix 32a.) listed (Appendix 61a.), counted to see if there were 3,000 or 5,000 or 7,000 or 10,000 or 14,000 or 15,000 or 2 or 3 suitcases full or 20,000 or 30,000 items as estimated by Respondent (Appendix 54a, 55a, 56a, 59a, 62a).

And Respondent without making any audit or assessment of any taxes, or holding any conference with Petitioner to discuss the assessment of any taxes, went into the United States District Court for the District of Maryland and "ASSUMED" that if Petitioner had a net income he would owe some tax (Appendix 45a.) and Respondent testified falsely as to Petitioner's contentions as to the date of the sale and use of some of the property (Appendix 35a-41a).

Respondent did these things to soften Petitioner up for the settlement complained of in this case, and then he filed jeopardy assessments, attachments and tax liens on all of Petitioner's property and seized and took all of Petitioner's money from his bank accounts to further soften Petitioner up for the signing of the stipulation and settlement and the Tax Court decision complained of.

And to further confuse and confound and coerce Petitioner and force him to sign the stipulation Re-

spondent refused to give him "ANYTHING" (Appendix 51a.) but Respondent did make up a dozen different claims for a dozen different sums of money ranging from $17,000 to $364,814.49 (Pet. Br. 38-39.) and repeatedly threatened to sell all of Petitioner's property to collect that money if the stipulation was not promptly signed. (Appendix 58a-61a.)

Petitioners ask this Court to please review this case and correct the injustice here pointed out.

THE FOURTH QUESTION

Did the Tax Court and the Court of Appeals for the Fourth Circuit err in refusing to set aside the judgment based on error in the assessment of these taxes and penalties?

Petitioners have pointed out the testimony in which Respondent has testified that these taxes and penalties were assessed without having made any audit, calculation, tabulation, list, count or any attempt to analyze the individual items, or any inquiry about the particular items, or the specific checks which were disallowed for the assessment of the taxes and penalties.

And Petitioners have pointed out the testimony by Respondent where he testified that these taxes and penalties were assessed by his agent as follows: "We take the total sum and apply in what in our judgment is a reasonable figure to apply" (Appendix 56a).

And Petitioners have pointed out the testimony by Respondent that Petitioners had complied with the requirements of the Internal Revenue Code by reporting all of their gross income (Appendix 25a, 31a, 63a.) and all expenses, "95 per cent of which were found to be allowable and were allowed" (Appendix 63a).

And Petitioners have pointed out the testimony by Respondent showing that whole columns of figures were disallowed by Respondent without "knowing why the column was in there at all. As a matter of fact; it is totally meaningless so far as our settlement was concerned" (Appendix 57a).

And Petitioners have pointed out the pressure exerted by Respondent to force the signing of the stipulation, the surveillance, fine, imprisonment, jeopardy assessments, tax liens, attachments, seizure and taking of all money and property, refusal to disclose the basis of any claims and assessments, threats to sell all of the property and "break" Petitioners.

Petitioners contend that the Congress provided in the Internal Revenue Code the exact method of assessing taxes and penalties and then gave Respondent the right to make a jeopardy assessment, place tax liens and seize and take the taxpayer's property if the properly assessed taxes were not paid or there was reason to believe that the taxpayer would conceal or dispose of the property to avoid the payment of the properly assessed taxes.

In this case Respondent placed the jeopardy assessments, tax liens, seized and took all of Petitioner's property, had Petitioner fined and imprisoned and kept in prison for evading and failing to pay taxes never assessed; and Respondent used those extreme and harsh means to force Petitioner's counsel to sign the stipulation for the assessment of these taxes and penalties.

Petitioners contend that if this Court permits these taxes to be assessed in this manner then the ownership of any business or property has become a liability. Any Internal Revenue Agent can follow any tax-

payer about until he finds some money or property to attach, and then without making any audit, tabulation, calculation, count or list he can attach, seize and take all of the property and money and have the taxpayer fined and put into prison and kept there for evading taxes the agent proposes to assess, or assumes he will assess, (Appendix 45a.) and he can seize and keep the property until the taxpayer agrees to pay whatever sum the agent chooses to assess: as Respondent said, "We take the total sum and apply in what in our judgment is a reasonable figure to apply" (Appendix 56a).

This method of assessing these taxes and penalties has been affirmed by the Court below and when it was pointed out to that Court that Respondent admitted that he had not even kept an accurate record of the money he had seized and taken to force the signing of the stipulation the Court said:

> "As the crediting of collections under the jeopardy assessment is not a matter which could effect the amount of the consent judgment entered by the Tax Court, it is not a matter which would justify a rehearing of the cause. If the taxpayer is entitled to any moneys collected under the jeopardy assessment which have not been properly credited against his tax liability, he has a remedy by suit therefor in a proper court, if they have not been refunded to him in the meantime." (Appendix 8a.)

Petitioner asks this Court to review this case and dismiss this judgment.

ROBERT E. FUNKHOUSER
Petitioner
5315 Colorado Avenue, N.W.
Washington, D. C.

June 28, 1956

APPENDIX A

Decision of the Tax Court

THE TAX COURT OF THE UNITED STATES
WASHINGTON

Docket No. 48119

ROBERT E. FUNKHOUSER and ELEANOR E. FUNKHOUSER, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Decision

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Court on November 16, 1954 at Washington, D. C., it is

ORDERED AND DECIDED: That for the year 1941 there are overpayments in income tax and 50% penalty in the respective amounts of $2,531.74 and $1,773.42 which amounts were paid after the mailing of the notice of deficiency, and that there is a deficiency in 5% penalty in the amount of $50.76 for said year;

That for the year 1942 there are overpayments in income tax and 50% penalty in the respective amounts of $5,137.07 and $5,775.94, which amounts were paid after the mailing of the notice of deficiency; that there is no deficiency in or overpayment of 25% penalty for said year; and that there is a deficiency in 5% penalty for said year of $429.86; and

That there are deficiencies in income tax and 50% penalty for years and in amounts as follows:

Year	Deficiencies Tax	50% Penalty
1943	$ 7,353.53	$3,676.77
1944	9,357.96	4,678.98
1945	13,740.49	6,870.25
1946	19,946.94	9,973.47
1947	14,842.56	7,421.28

(Signed) J. E. MURDOCK
Judge.

Enter: Entered Nov. 24, 1954

bwp

APPENDIX B

Decision of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7057.

Robert E. Funkhouser and Eleanor E. Funkhouser,
Petitioners,

versus

Commissioner of Internal Revenue,
Respondent.

On Petition to Review the Decision of The Tax Court of the United States.

(Argued October 17, 1955. Decided November 7, 1955.)

Before Parker, Chief Judge, Dobie, Circuit Judge, and Bryan, District Judge.

Robert E. Funkhouser, Pro Se, and Walter Akerman, Jr., Attorney, Department of Justice, (H. Brian Holland, Assistant Attorney General, and Ellis N. Slack, Attorney, Department of Justice, on brief) for Respondent.

Per Curiam:

This is a petition to review an order of the Tax Court refusing to vacate a prior judgment of that court. That

judgment was rendered by consent of counsel for taxpayer, who after a number of conferences with the representatives of the Commissioner of Internal Revenue had reached an agreement as to deficiencies in taxpayer's income tax liability for the years 1941 to 1947. Taxpayer contends that the deficiencies as evidenced by this agreement were not properly computed; but his counsel testified in the hearing before the Tax Court, on taxpayer's motion to vacate the order, that the agreement embodied the best settlement that they could obtain after lengthy negotiations, that they considered it in taxpayer's interest, that it was thoroughly explained to taxpayer and that he consented to it and authorized its entry. He did not deny this, but relied upon the financial pressure resulting from the jeopardy assessment and levy upon his property as grounds for relief from the judgment. There was no evidence of fraud or mistake in the settlement, however, and no ground upon which we would be justified in holding that the Tax Court abused its discretion in refusing to set aside the consent judgment. That judgment, so long as it stands, precludes re-examination of taxpayer's tax liability for the years in question.

Affirmed.

APPENDIX C

Order Granting Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7057.

Robert E. Funkhouser and Eleanor E. Funkhouser,
Petitioners,

versus

Commissioner of Internal Revenue,
Respondent.

On Petition to Review the Decision of The Tax Court of the United States.

Order

In the above entitled case the petitioners having filed a petition for rehearing alleging that newly discovered evidence establishes that, in arriving at a settlement of the tax liability for the years in question, there was a mistake as to the amounts of taxes and penalties theretofore paid for those years and that this can be established by records of the government itself:

It is ordered that oral argument be had on the petition for rehearing addressed to the following questions:

(1) Does the alleged newly discovered evidence show error or mistake entitling petitioners to relief from the judgment appealed from?

(2) If so, is the matter one for disposition by this Court, or should the case be remanded to the Tax Court to

the end that that court may consider a motion for relief on the ground of newly discovered evidence?

It is further ordered that the petitioners be allowed 30 days from this date within which to file brief and that the government be allowed 30 days thereafter to file a reply brief thereto and that the oral argument be had at the March special term of this Court.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

ARMISTEAD M. DOBIE
United States Circuit Judge.

ALBERT V. BRYAN
United States District Judge.

Filed Dec. 16, 1955

R. M. F. WILLIAMS, JR.
Clerk

A true copy,
Teste:

RICHARD M. F. WILLIAM, JR.,
Clerk of the United States Court of Appeals for the Fourth Circuit.

APPENDIX D

Judgment of Court Below Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7057.

Robert E. Funkhouser and Eleanor E. Funkhouser,
Petitioners,

versus

Commissioner of Internal Revenue,
Respondent.

On Petition to Review the Decision of The Tax Court of the United States.

On Petition of Petitioners for Rehearing.

(Argued March 21, 1956, Decided April 9, 1956.)

Before Parker, Chief Judge, Dobie, Circuit Judge, and Bryan, District Judge.

Robert E. Funkhouser, Pro Se, and Walter Akerman, Jr., Attorney, Department of Justice, (Charles K. Rice, Acting Assistant Atorney General, Lee A. Jackson and A. F. Prescott, Attorneys, Department of Justice, on brief) for Respondent.

Per Curiam:

A petition for rehearing filed in this case alleges that taxpayer had just discovered evidence to the effect that approximately $32,000 collected under a jeopardy assessment had not been properly credited on the judgment of the Tax Court. We ordered argument on the petition for the purpose of determining whether there was newly discovered evidence showing error or mistake entitling taxpayer to relief from the judgment appealed from, and whether the case should be remanded to the Tax Court for reconsideration in the light thereof. On the argument, it appears that, if there was mistake in crediting collections under the jeopardy assessment, this was not a mistake affecting the amount of the judgment from which appeal was taken. The Commissioner contends that the apparent discrepancy between the amount collected under the jeopardy assessment and the amount credited on the judgment is explained by the fact that part of the amount collected was used in the payment of interest for which taxpayer is liable but which is not dealt with in the judgment. The Commissioner admits, however, that there was an error in the computation of interest of approximately $1,000 for which he has tendered a refund to taxpayer.

As the crediting of collections under the jeopardy assessment is not a matter which could affect the amount of the consent judgment entered by the Tax Court, it is not a matter which would justify a rehearing of the cause. If taxpayer is entitled to any moneys collected under the jeopardy assessment which have not been properly credited against his tax liability, he has a remedy by suit therefor in a proper court, if they have not been refunded to him in the meantime.

Rehearing Denied.

Letters of Approval of Former Returns

The following letters from Respondent show that Respondent regularly made formal examinations of Petitioner's books, records and returns.

During the ten years immediately preceding this period he made seven such examinations. All satisfactory.

During all of this period, and for many years prior thereto Petitioners have owned and operated exactly the same kind of business and have had exactly the same kind of income and expenses, kept exactly the same kind of books and records, and reported all income and all expenses in exactly the same way.

Petitioners took those books and records to Respondent's office and Respondent's agents computed the net taxable income and the taxes to be reported for each of the years 1931-1947.

The following letters show that Respondent found the records complete, and satisfactory, and his testimony quoted in pages that follow shows that he found all income and all expenses reported, and that exactly the same kind of books and records were kept throughout the entire period.

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

1002 Int'l Revenue Bldg.,
Waslington, D. C.
Juy 8th, 1933

Office of Deputy Collector
District:
Maryland

Mr. Robert E. Funkhouser,
5315 Colorado Avenue, N. W.,
Washington, D. C.

Dear Sir:

Enclosed herewith is copy of report of Deputy Collector Joseph Stearns, dated July 8, 1933, covering his investigation of your income tax liability for the year 1931, and showing corrected tax liability of $8.37, plus interest of 67 cents.

Copy of this report is furnished for your information only. Payment is to be made upon receipt of a bill for tax due from the Collector of Internal Revenue, Baltimore, Maryland.

Very truly yours,

CLARENCE C. KEISER
Acting Ass't Chief Field Deputy

M G D
Enclosures

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Baltimore, Md.
October 25, 1934.

Office of the Collector
District of Maryland
In Reply Refer to

Mr. Robert E. Funkhouser,
5315 Colorado Ave., N. W.,
Washington, D. C.

Dear Sir:

Enclosed herewith is report of Deputy Collector Joseph Stearns, dated October 2, 1934, covering his investigation of your income tax return for the year 1932, disclosing an additional assessment in the amount of $45.17, which is recommended by this office.

Respectfully,

A. PARKER RASIN
Chief Field Deputy.

CAZ.
Encl.

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Washington, D. C.

Office of Deputy Collector
District of Maryland

1002 Internal Revenue Building,
Washington, D. C.
July 7, 1936.

Mr. Robert E. Funkhouser,
5315 Colorado Avenue, N. W.,
Washington, D. C.

Dear Mr. Funkhouser:

Your Income Tax Return for the year 1934 has been referred to me for audit from the Baltimore office. If you will let me know when you can be at this office, I will be pleased to arrange an appointment to suit your convenience. My telephone number is National 1516.

Respectfully,

JOSEPH STEARNS
Joseph Stearns
Deputy Collector

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Baltimore, Maryland.
October 5, 1938.

Office of
Internal Revenue Agent in Charge

In re:
Years covered: 1936.

Mr. Robert E. Funkhouser,
5313 Colorado Avenue, N. W.,
Washington, D. C.

Sir:

This office is recommending to the Commissioner of Internal Revenue that your income tax returns for the year or years indicated be accepted as correct.

I am sure you will appreciate that this action is subject to approval in Washington, and also that should subsequent information be received which would materially change the amount reported, the Bureau is obliged under existing laws to redetermine your tax liability.

Respectfully,

J. C. WILMER
J. C. Wilmer,
Internal Revenue Agent
in Charge.

MK

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Baltimore, Maryland.
October 23, 1940.

Office of
Internal Revenue Agent in Charge
Baltimore Division

Mr. Robert E. Funkhouser,
5315 Colorado Avenue, N. W.,
Washington, D. C.

In re:
Date of Report: September 10, 1940.
Year(s) Examined: 1939.

Sir:

There is enclosed for your information and files a copy of a report covering the examination of your income tax return(s) for the year(s) indicated, recently made by a representative of this office. You have indicated your agreement to the adjustment of tax liability shown in the report.

The item checked below explains briefly how settlement of the agreed tax liability will be accomplished through the office of the Collector of Internal Revenue for your district.

Respectfully,

J. C. WILMER,
Internal Revenue Agent
in Charge.

Robert E. Funkhouser Year Ended 12/31/1939

SCHEDULE 1

Adjustments to Net Income

Net income as disclosed by return	$5,389.58
As corrected	5,389.58
Net adjustment as computed below	none
Net adjustment as above	none

SCHEDULE 1-A

Explanation of Items

All items of income and deductions were verified and found correct as reported in the return. Gross rents $41,667.71 was found correct as reported and included the amount of $2,575.54 reported on Form 1099 associated with the return. Interest paid $13,139.20 and Taxes $7,233.67 was found correct as deducted. Other deductions $15,905.26 consisted of repairs, insurance, water rent and miscellaneous expenses all of which were found to be allowable.

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Washington, D. C.
September 29, 1941

Office of
Internal Revenue Agent in Charge
Baltimore Division

In re: Review of personal income tax return for Year 1940

Mr. Robert E. Funkhouser,
5315 Colorado Ave. N. W.,
Washington, D. C.

Sir:

Your income tax return for the period above indicated has been referred to this office for verification.

It is possible that it would best serve your convenience to appear at the office of the undersigned as indicated below. If so, please bring with you such books, records and other data as were used by you in computing your income tax liability for the period involved, or which will assist this office in determining your taxable net income for the year in question.

It is particularly important that you have with you your record of work papers and books from which the return was prepared.

Please present this notice, and ask for Revenue Agent Jones. If you desire other arrangements, please return this notice immediately with your request therefor.

Respectfully,
J. C. WILMER,
Internal Revenue Agent
in Charge
By EDWIN SMITH,
Edwin Smith,
Internal Revenue Agent.

Bureau of Internal Revenue — Room 1042
Date Friday, Oct. 3, 1941 — Time 9:15 a.m.

TREASURY DEPARTMENT
OFFICE OF
COMMISSIONER OF INTERNAL REVENUE
Washington

Income Tax Unit
IT:C1:CC

Certificate of
Overassessment

Number: 1590353
Allowed: $6.97
Schedule No. 79003

Mr. Robert E. Funkhouser,
5315 Colorado Avenue, N. W.,
Washington, D. C.

Sir:

An audit of your income tax return, Form 1040, and a consideration of all the claims (if any) filed by you for the taxable year ended December 31, 1940 indicates that the tax assessed for that year was in excess of the amount due:

Assessed:	Income Tax
Account # 264191	$262.52
Correct Liability	255.55
Overassessment	$ 6.97

The overassessment shown herein results from the adjustment shown in a revenue agent's report, a copy of which report has been furnished you.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

By direction of the Deputy Commissioner:

Respectfully,

T. C. Atkeson
Head of Division.

Abated: $6.97
Credited: $
To Tax. Year
Credited: $
To Tax. Year
Refunded: $
Interest: $

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Baltimore 2, Maryland
August 31, 1943

Office of
Internal Revenue Agent in Charge

In re:
Year(s) covered: 1941

Mr. Robert E. Funkhouser, and
Mrs. Eleanor E. Funkhouser
5315 Colorado Avenue, N. W.
Washington, D. C.

Sir and Madam:

Upon examination of your income tax return(s) for the year(s) indicated above, the conclusion has been reached that it (they) should be accepted as filed.

I am sure you will appreciate that should subsequent information be received which would materially change the amount reported, it will be necessary under existing laws to redetermine your tax liability.

Respectfully,

J. C. WILMER,
Internal Revenue Agent
in Charge.

CEW

Respondent disallowed for the assessment of these taxes and penalties all expense items questioned by the Special Agent and the Intelligence agent.

Respondent testified to this in his testimony before the Tax Court on March 16, 1955 as follows.

Official Report of Proceedings Before the Tax Court of the United States
Docket No. 48119

[TC. Page 40*]

LLEWELLYN A. LUCE was called as a witness for and on behalf of Respondent, and having been duly sworn, was examined and testified as follows:

* * * *

[TC. Page 49]

"The bureau refused to concede any of those items that had been labeled by the special agent and the intelligence agent as fraudulent items, although they were discussed."

* * * *

Respondent's special agent, Charles H. Knight, testified that he worked extra-hours on this case to supplement his family income. He testified in,

United States District Court for the District of Columbia
Civil Action No. 4626-47
Knight vs. Knight

[TC. Page 27.]

By Charles H. Knight: "That on the night of November 7, 1947, when the defendant (Charles H. Knight) returned home about 11:00 P.M. from working late on an extra-hours job he had taken for the purpose of supplementing the family income ..."

* * * *

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* This petition makes reference to the following: The briefs filed in the Court of Appeals for the Fourth Circuit as certified by the Clerk of that Court. The testimony of Respondent's agents and witnesses before the Tax Court (TC .) and the testimony of the special agent and the intelligence agent before the United States District Court for the District of Maryland in Criminal Case No. 21794. (TR .) All references are to the page number of the official transcript. References to the other materials are specifically descriptive.

And this special agent testified as follows as to the kind of examination he made, and the kind of items he disallowed, in his testimony before the

United States District Court for the District of Maryland
In United States vs. Robert E. Funkhouser
Criminal Case No. 21794

[TR. Page 1]

CHARLES H. KNIGHT, was called as a witness for and on behalf of the Government, and having been duly sworn according to law, was examined and testified as follows:

* * * *

[TR. Page 342]

By Mr. Anderson:

Q. Now, this investigation of Mr. Funkhouser, approximately when did you start?

A. I contacted Mr. Funkhouser on November 10, 1947, as I recall.

Q. Now, prior to November 10, 1947, how long, if at all had you been investigating Mr. Funkhouser?

A. Maybe a few weeks, a couple of weeks, I would say. * * * I finally contacted him on November 10th in Mt. Rainier.

Q. Whereabouts?

A. On Rhode Island Avenue at a place where his car had been parked.

Q. Well, how did you happen to meet him at his automobile on Mt. Rainier Avenue?

A. Because, as I said before, for two or three weeks we had made what we called a preliminary examination. I had ascertained the identity of his car and license number, and I found such car there on Rhode Island Avenue, and I waited until he returned to the car.

Q. But you never wrote him any letter requesting an appointment?

A. No, sir.

• • • •

[TR. Page 347, line 1.]

Q. And at that time did Mr. Funkhouser turn over to you his books?

A. He turned over to me some of his records, yes, sir.

Q. Did he turn over to you his ledgers?

A. Yes, sir.

Q. Check stubs?

A. Yes, sir.

Q. Cancelled checks?

A. That is correct.

Q. How about any other records that he had?

A. I think he also gave me some records pertaining to his rental income or rental receipts, which were bound with, as I remember a couple of bolts or something to that effect. They were very thick and more or less in the size and shape of a receipt.

Q. He turned all of those over to you voluntarily?

A. By request, yes, sir.

Q. Now, did you talk with Mr. Funkhouser at that time as to whether or not he had anyone to assist him in making out his return?

A. I did, sir.

Q. What did he tell you?

A. I asked if he had an accountant or had anyone who had assisted him. He said he did not have an accountant. He said frequently he had inquired of knowledge at the Collector's office, and I believe he also stated Revenue Agent's office. I asked him if he could—whether it was on this particular occasion or not, Mr. Anderson, I wouldn't want to be held responsible, but in this one or a subsequent interview I did ask him that specific question, and he stated that he had consulted the Revenue Agent's office or the Collector's office, but he was never at any time able

to furnish me with any of the names of the officers at the Revenue Office.

Q. Did he show you any letters that he had received from the Bureau with reference to his returns?

A. It seems that I did see one, but I am not certain, Mr. Anderson. I wouldn't like to say definitely.

Q. Do you recall whether it was more than one?

A. I only have knowledge of seeing one. He did show me one, I belive, but this was, I think, quite old, as I remember it. In fact, it was for some years prior to these that we were investigating, as I recall, sir. I wouldn't like to be responsible for this answer, testifying from memory.

Q. Did it contain the name of the person whom he had contacted at that time?

A. I believe it did, yes, sir.

Q. Did you contact that gentleman?

A. I believe I did try to contact this fellow, but off hand I don't remember the name. I did endeavor to reach some one who had some connection with Mr. Funkhouser.

* * * *

Q. Did you consult the file of the Collectors office of the Bureau of Internal Revenue agent's office?

A. No, sir.

Q. Did you consult the files of the Collector's office of the Bureau of Internal Revenue or the agent in charge?

A. No.

* * * *

Q. And you say you made an investigation to ascertain who the gentleman was whom Mr. Funkhouser had contacted?

A. I did. I endeavored to find some of the agents or deputies whom he had spoken with.

* * * *

Q. Did he tell you who suggested that he set up his books in that manner?

A. He might have.

* * * *

By the Court: I have heard no complaint of the method of bookkeeping. The criticism of the Government is that the expenses as charged were not deductible. Now that is the issue in the case so far.

[TR. 10]

Questions By Mr. Green:

Q. Well, now, Mr. Knight, on the occasion of either your first or your subsequent meetings with Mr. Funkhouser, did you ask him for his books and records?

A. Yes. On this initial meeting with Mr. Funkhouser, I asked him if he had, since he had made reference to records which he had, when he was asked about his various properties, about the various mortgages on his property, and he stated, his answer would be, as per records, as per records. So, after we had completed this interview, also after we had inventoried his safe deposit box, Mr. Funkhouser accompanied us to his home over on 5315 Colorado Avenue in which he furnished us with the canceled checks, his check stub books and, as I recall, two bound volumes of books which contained the years 1941 to October of 1946, to the best of my recollection. Now, these books were given to me by Mr. Funkhouser and, in fact, it was so voluminous at the time he furnished them that at the time he furnished us with a suitcase in which to carry these to the office in.

* * * *

[TR. 19]

Q. Now, Mr. Knight, did you make photostatic copies of the Ledger Books which Mr. Funkhouser gave you?

A. Yes, for each year, Mr. Green.

Q. Now, I hand you certain sheets, and ask you if that is a photostatic copy of Mr. Funkhouser's Ledger for the year 1943?

A. Yes, sir, it is. He also furnished in addition a book what may be termed a reconciliation sheet. For instance, the checks shown here (indicating) for the purpose of making or preparing his income tax returns for the year 1943.

Q. Now, Mr. Knight, first let us describe this (indicating). Now, I think it is correct, that if each month is handled this way then it is handled the same for each year; is that not correct?

A. That is right.

* * * *

[TR. 20]

Q. Now, is it not true that down this column (indicating) there is a check number?

A. The check number issued by Mr. Funkhouser.

Q. And then immediately next to it appears to be the name of the payee of the check?

A. The payee, that is right, sir.

Q. And then, is it not generally true that immediately beside the name of the payee, is it not right, there is some notation indicating the purpose of the payment?

A. That is right, sir.

Q. And then there are four columns, one headed debt, the second headed property, the third headed interest, and the fourth headed maintenance, is that not correct?

A. That is right, sir.

[TR. 21]

Q. *And each of the payments represented by the listing of the checks is then entered in one* of the four columns; is that not correct?

A. That is correct, sir.

Q. *And then the last page has a listing of the receipts by month from each of the rental properties; is that correct?*

A. That is correct, sir.

* * * *

Question by the Court: I understand, Mr. Knight, that you say that this method of keeping accounts for tax

purposes, or for any other purposes, was consistant throughout all four or five of the years, from 1943 through 1947?

A. That is right, sir.

• • • •

[TR. 30]

Q. Now, Mr. Knight, did you ascertain from the records Mr. Funkhouser furnished you whether the figures appearing on his income tax return in 1943 were taken directly from the ledger which you have just identified?

A. That is true, sir.

Q. Were they, or were they not?

A. They were. They were taken from him.

Q. From the ledger?

A. From the reconciliation sheet that I have made reference to.

Q. Well, now, did Mr. Funkhouser give you a copy of the reconciliation statement?

A. Yes, sir, he did.

Q. And is this photostatic copy of the reconciliation statement, or analysis sheet, as it is entitled?

A. That is right, sir.

• • • •

[TR. 32]

Q. Now, what is the relationship between this analysis and the original books which the jury now have?

A. The checks, well, are the amounts shown on that book, the ledger sheet was brought forward and allocated further out to what actual expense Mr. Funkhouser has deemed it the actual heading.

• • • •

[TR. 33]

Q. In other words, then, is it fair to say that this analysis sheet, Government's Exhibit No. 45, is a more specific breakdown of all the expenditures shown under the general headings on the ledger?

A. Yes. These amounts were traced in each instance from the book to the analysis sheet.

* * * *

[TR. 34]

Q. Mr. Knight, is it true that at the bottom of the last page of Mr. Funkhouser's analysis sheet, he has totalled each column. In other words, he has the totals for taxes, interest, insurance, water, et. certera?

A. That is right. True.

Q. Now, are the totals appearing on the bottom of this analysis sheet the same totals that appear on Mr. Funkhouser's income tax return for the year 1943?

A. That is right, sir, those totals shown on the bottom of the analysis sheet are the same figures that are carried forward and made a part of Mr. Funkhouser's income tax returns for the year 1943.

THE 1944 RETURN

[TR. 140]

Q. (By Mr. Green) Now, Mr. Knight, did you receive from Mr. Funkhouser a copy of his ledger for the year 1944?

A. (By Mr. Knight) Yes.

* * * *

[TR. 142]

Q. Now, what he did was to list each check or each alleged payment he received in each of the four months and he broke them down into four headings and in the remaining months he broke them down into 12 or 15 columns; is that correct?

A. That is correct.

* * * *

Q. So he kept a running total of the expenses throughout the year?

A. Yes.

Q. Now, at the end of the year did he total each expense column?

[TR. 143]

A. That is correct.

Q. Now, would you look at the totals at the end of each expense column in those books and compare them with the total of his expenses which went into the 1944 return?

The Court: Well, he has probably done all that.

The Witness: That is correct.

The Court: Just say yes.

The Witness: Yes, yes, Your Honor.

Q. (By Mr. Green) The books tie in with the tax return?

A. That is correct.

Q. The expenditures shown on the books ultimately comprise the totals which went on the tax return?

A. Yes, sir.

Mr. Green: Would your Honor care to see the 1944 return?

The Court: Yes, I would.

(Paper was handed to the Court)

The Court: Well, I see that this is pretty much in the same form as the 1943 return.

It lists several properties and includes on the last column on that page gross income or rentals from each of the properties—at least I assume that is what it purports to be—and then in a similar column it has under the heading [TR. 144] the maintenance expenses which he deducted, making the total gross receipts $68,000 plus and the expenses $70,000 plus with a loss stated of $1700 or something like that.

Now, your problem is with the items here under the head of maintenance, isn't it?

Mr. Green: That is correct, sir.

The Court: Do you want to show it to the Jury?

* * * *

THE 1945 RETURN

[TR. 176]

Q. (By Mr. Green) Now, Mr. Knight, with regard to the year 1945, did you receive Mr. Funkhouser's ledger from him as part of the books and records he turned over to you?

A. I did, sir.

Q. I hand you this photostatic copy, and ask you if this [TR. 177] is a copy of Mr. Funkhouser's ledger, and the one which you received from him, for the year 1945, (handing paper to witness)?

A. It is, sir.

* * * *

Q. (By Mr. Green) Now, Mr. Knight, is it true that these 1945 books were kept in the same manner as the 1944 books, that is, along the right hand side there is a list of the payee, or supposed payee of the check, the check number, and then the amount that was expended? They were under various columns; taxes, insurance, water and so on and so forth?

A. That is correct, sir.

* * * *

[TR. 178]

Q. Now, did Mr. Funkhouser keep monthly totals, cumulative totals, for each month of all expenses?

A. That is correct, for each month.

Q. Have you got a final figure at the end of 1945 for his expenses?

A. That is correct, sir.

The Court: Then, they were carried into the income tax return the same way as they were for 1944?

The Witness: That is correct, sir.

The Court: Very well.

Do you want to put it in evidence?

Mr. Green: Here is the tax return, if Your Honor would like to see it. (Handing paper to the Clerk)

THE 1946 RETURN

[Tr. 206]

Q. (By Mr. Green) Now, Mr. Knight, did you receive Mr. Funkhouser's ledger for the year 1946?

A. I did, sir.

• • • •

Q. And is it kept in precisely the same fashion as the one for the year 1945?

A. That is correct.

• • • •

Q. Now, Mr. Knight, have you compared the defendant's ledger for the year 1946 with his income tax return?

[TR. 207]

A. I have, sir.

Q. The figures on the return come from the ledger?

A. That is correct.

THE 1947 RETURN

[TR. 262]

Q. (By Mr. Green) Did you receive from Mr. Funkhouser his ledger for the year 1947, Mr. Knight?

A. That is correct, sir.

[TR. 263]

Q. And when did you first receive that book from him?

A. On or about November 10, 1947.

Q. And did you subsequently return it to him so that he could prepare his 1947 income tax return?

A. That is correct, sir.

• • • •

[TR. 264]

Q. Now, Mr. Knight, Mr. Funkhouser's ledger for 1947 was similar to the ledgers for the prior years and kept in the same manner?

A. That is correct.

Q. Did you check the 1947 income tax return with the 1947 ledger?

A. I did, yes.

Q. Can you state whether or not the return was prepared from this ledger?

A. That is right.

Q. And is it true that the items of expense shown on the ledger for 1947 ultimately did get into the income tax return of 1947?

A. Yes.

The Court: Well, it seems to be the same general principle.

Petitioner's Reported and Respondent Admitted He Found All Gross Income Reported

[TR. 355]

Question by Mr. Anderson: "You made an investigation as to all of the businesses Mr. Funkhouser was in?"

Answer by Mr. Knight: "To the best of my knowledge, yes, sir."

Question by Mr. Anderson: "And as to the sources of his revenue, do you recall finding those in Mr. Funkhouser's records?"

Answer by Mr. Knight: "The rental income and the interest income and the salaries received from the Independent Laundries for the year 1943."

Question by Mr. Anderson: "So that what the Court said, is it not the point that there is no hidden income but the alleged improper deductions?"

Answer by Mr. Knight: "That is correct."

* * * *

Respondent Made No Audit of the Books and Records

[TR. 23]

Question by the Court: "Well, now, have you made any tabulation? I do not think it is at all necessary, I am merely inquiring as to whether you have made any tabula-

tion of what his aggregate amounts are for that year, which appear on these books. That is to say, if his gross receipts were seventy thousand dollars, and his expenses were, say, sixty-nine thousand dollars, what amount of that sixty-nine thousand of expenses was not represented by available vouchers, or papers, or receipted bills?"

Answer by Mr. Knight: "No, sir, we have not made such calculation."

Question by the Court: "Well, in that same connection, coming closer to the papers that the jury have before them, taking the first sheet of the tabulation called 'Government's Contentions' for the year 1943 we find that the gross income is put at $60,818.34, and operating expenses were $52,424.12. Have you made any tabulation for that whole year of how much of the fifty-two thousand is not represented by a check, or by invoice, or by any bill, or anything like that?"

Answer by Mr. Knight: "No, sir, we did not."

* * * *

The agent made no inquiry about the particular items

[TR. 44]

Question by the Court: Well, do you remember just what he said, what words he used? You have given us the substance of your recollection that he admitted it was a duplication, but did he give you any explanation of how the duplication occurred?

Answer by Mr. Knight: "I can't say just exactly what the exact words were. I did call his attention in the various interviews to the specific checks, but whether I did in this particular one, I am not sure, Your Honor."

* * * *

The agent made no inquiry about the specific checks

[TR. 382]

Question by Mr. Anderson: Now, Mr. Knight, the checks that I have just mentioned are similar to the other checks which make up the item of $3,784.99; is that not correct?

Answer by Mr. Knight: That is correct.

Q. Now, what did Mr. Funkhouser say to you about those checks and this item?

A. The $3,784.99?

Q. Yes, sir, if you had a conversation with him about it.

A. Now, as to each of these specific checks, I won't say I had conversations with him.

Q. I am not talking about these specific checks individually but the transactions as such.

A. As shown on his record there, it indicated it was paid expenses incurred by the laundry.

Q. Did you question him about those expenses?

A. I wouldn't say that I questioned him about these specific checks, no, sir.

* * * *

The agent disallowed all automobile expenses

[TR. 406]

Question by Mr. Anderson: "Mr. Funkhouser did use his automobile to get around to his business property. Did he not?"

Answer by Mr. Knight: "His contention was that he did. Yes, sir."

Question by Mr. Anderson: So you refused to allow it anyhow?"

Answer by Mr. Knight: "I refused to allow them in the entirety, yes, sir."

* * * *

The agent disallowed items never expensed

[TR. 193]

Question by Mr. Green: "Well, the next item is 'Purchase of forty shares of Prince George's Bank and Trust Company'. Was that reflected on Mr. Funkhouser's books, that payment of $800.00?"

Answer by Mr. Knight: "That is correct."

Question by the Court: "Then how is it charged on the Income Tax return?"

Answer by Mr. Knight: "As Miscellaneous Property expense."

* * * *

Respondent's agent testified that he had disallowed checks for depreciable items but he had allowed no depreciation on those items

[TR. 172]

Question by Mr. Green: And most of the 34 checks were drawn to one of those two auctioneers; is that correct?

A. Most of them were.

Q. And for what were the checks written?

A. They were charged to maintenance expense, or property improvements in all instances.

Q. And you know for what purpose payments were made?

A. As far as I could ascertain, it was for the purchase of furniture for apartments, or for the taxpayer's private home, or private summer home.

Q. Now, you have testified before, have you not, that some time during the war when rent controls were in operation that Mr. Funkhouser rented numerous furnished apartments; is that right?

A. That is correct.

Q. Now, what is your contention that Mr. Funkhouser should have done with these 34 payments totalling $4,700?

A. They should have been capitalized as an asset and recovered through depreciation.

* * * *

[TR. 416]

Question by Mr. Anderson: "Mr. Knight, to go back for a moment. The furniture, which Mr. Funkhouser purchased for his different furnished apartments from time to time, do you remember testifying to that?"

A. "Yes, sir."

Q. "Did you at any time allow him any depreciation for that?"

A. "No. No such allowance was made in this computation. Exceptions were made as to how they were deducted on his records, as shown in his records and in his income tax returns."

Q. "Now, in his records and in his income tax returns, does he show any depreciation on that property?"

A. "To the best of my memory, there is no such deduction made for depreciation of furniture on his returns, no, sir."

Q. "Does he claim any?"

A. "To the best of my memory, there is no such deduction made for furniture on his returns, no, sir."

Q. "Well, now, did you in determining whether any tax was due, did you include in your computation any depreciation on this furniture that was purchased by Mr. Funkhouser?"

A. "No, sir we didn't calculate depreciation on his furniture."

Respondent's agent knowingly testified falsely as to the date of the saleof the largest piece of property involved

[TR. 5]

Statement by Mr. Knight: "However, he stated that he sold the propety in 1944. 1944 is the date which he gave me at the time of the interview and subsequently investigation disclosd that it was sold, or occupancy of the laundry was tansferred to Mr. Abe Schnider in October of 1943."

* * * *

That testimony as to the Petitioner's contentions as to the date of the sale of the laundry was false, and was known to be false by the agent when he so testified. It is proved to be false by the agents own testimony 334 pages later when hewas trying to emphasize another point.

* * * *

[TR. 339]

Question by Mr. Green: "Now, Mr. Knight, just before we stopped for the recess, you testified, I believe that in one of your interviews with Mr. Funkhouser he told you that in 1943 he sold the laundry to Mr. Schnider. Now, are those Mr. Funkhouser's words?"

Answer by Mr. Knight: "In one interview that was his exact words, that the laundry had been sold in October of 1943."

Question by Mr. Green: "Approximately when was that interview, Mr. Knight?"

Answer by Mr. Knight: "Well, as I say, the first interview was November 10th of 1947."

Question by Mr. Green: "I mean the interview at which he told you that this laundry property had been sold, when was that?"

Answer by Mr. Knight: "That was probably April of 1948 and November 10th, 1947. In both those interviews he related that the laundry had been sold, furnishing me the name of the purchaser."

Question by Mr. Green: "Subsequent to those statements did Mr. Funkhouser say anything to you about this sale?"

Answer by Mr. Knight: "I didn't ask him specifically about the sale."

* * * *

Respondent's special agent knowingly testified falsely as to petitioners' contentions as to the use of some of the property

* * * *

[TR. 95]

Question by Mr. Green: "Now, the next items, Mr. Knight, are classified as 'equipment and supplies for Larramore'. Now, what is Larramore?"

Answer by Mr. Knight: "Larramore is the name of the summer estate of Mr. Funkhouser located on the South River, as he stated to me."

* * * *

[TR. 96]

Q. "Have you ever been there?"
A. "Yes, I have."
Q. "Can you give us the year?"
A. "Approximately in 1949."

* * * *

[TR. 97]

Q. by Mr. Green: "What was there? What buildings were there?"

A. "On entering, as I said, after getting into there or going through the gate, to the right, in Arms Creek, there is a boat house, and then you have a big house, which I might refer to as the larger house on the property, and after leaving there I was again down by another house, that is known as the tenant house, and at that time it was being remodeled, made over, and there is still another house on the property, I understand."

* * * *

[TR. 99]

Question by Mr. Green: "Now, Mr. Knight, what else if anything did you observe when you visited this place you referred to? (Approximately in November, 1949) Did you observe any crops growing or animals of any kind?"

A. "As I recall there were no crops to my knowledge that I recall offhand."

Question by the Court: "Was the seventy acres wooded or not?"

Answer by Mr. Knight: "Yes, I might say, I would say that from my observation the land is wooded because it is on the South River, and you can see that on the north side, Arms Creek is on the south side, and you enter in from a private beach, I mean it is made up of private owners who have bought lots in there and they divided it into beach lots."

Question by the Court: "How many front feet of water-front does he have?"

Answer by Mr. Knight: "I can't estimate it, Your Honor."

Question by the Court: "What is the depth of the water there at the shore?"

Answer by Mr. Knight: "The depth of the water I would say in Arms Creek, I can estimate it would be more shallow than out in South River there. Arms Creek does feed into South River which is navigable."

The Court: "Well, I think you have the description of the particular item which would seem to make the thing relevant. The next item, Mr. Green, what is that?"

* * * *

[TR. 101]

It can be covered without so much detailed reference, and I don't think anybody has the idea that the witness is making up figures out of his head or anything of that kind.

* * * *

[TR. 104]

Question by the Court: "Do you know for what purpose this was acquired in 1943?"

Answer by Mr. Knight: "It was during all the interviews with Mr. Funkhouser, the original interview and many other interviews we had which he stated it was his summer home on South River."

* * * *

[TR. 104]

Question by Mr. Green: "Did Mr. Funkhouser ever contend to you at any time during your investigation that prior to the time of the investigation he had acquired to subdivide this property or build houses there or anything of that kind?"

Answer by Mr. Knight: "No, he didn't contend that, sir."

* * * *

[TR. 105]

Question by the Court: "Well, if the property was acquired for business purposes, as I recall the law on the

matter, and if the expenditures were for business purposes, then they are deductible as business expenses if they are properly classified or indicated on the return. If however, they were merely for a summer home, that would not be so deductible; is that right?"

Answer by Mr. Knight: "That is right, Your Honor."

Respondent's special agent Charles H. Knight knew that he was testifying falsely as to Petitioner's contentions as to the use of this property. Here is a copy of Petitioner's answers to the special agent's questions at two formal interviews held by the special agent in his office in the Internal Revenue Bureau. The answers were made under oath administered by the special agent.

THE ORIGINAL INTERVIEW

1. Formal interview of April 12, 1948 in the office of special agent Charles H. Knight

Testimony of Mr. Robert E. Funkhouser, of 5315 Colorado Avenue, N. W., Washington, D. C., taken in the Office of the Intelligence Unit, Bureau of Internal Revenue, Building S, Washington, D. C., at 9:15 a.m. April 12, 1948, in the matter of his income tax liability to the United States.

Present: Mr. Robert E. Funkhouser (Taxpayer)
Mr. Charles H. Knight, Special Agent
Mr. Edward A. Conroy, Jr., Auditor and Accountant
Recorder: Miss Nina J. Hansen

Questions were asked by Special Agent Knight and answers made by Mr. Funkhouser.

Q. Mr. Funkhouser, will you please stand and raise your right hand? Do you solemnly swear that the testimony you are about to give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

* * * *

[Page 4]

Q. You bought a farm on the South River from Mr. Ogilby, known as the Wilmer Estate, I believe; how much did you pay for that, sir?

A. $25,000.00.

Q. That is your summer home?

A. No. I bought it intending to develop it as a waterfront development.

Q. But you do maintain a summer home there?

A. No. I am there very little.

Q. When was it purchased?

A. In 1939.

THE SECOND INTERVIEW

2. Formal interview of August 12, 1948 in the office of special agent Charles H. Knight

Interview regarding the income tax liability of Mr. and Mrs. Robert E. Funkhouser, for the years 1941 to 1947, inclusive, held in the Office of the Intelligence Unit, Temporary Building "S", Sixth Street and Jefferson Drive, S. W., Washington, D. C., at 2:00 p.m., on August 12, 1948.

Present: Robert E. Funkhouser, Taxpayer
Mrs. Robert E. Funkhouser, Taxpayer
John Berg, Accountant
Paul S. Harab, Accountant
Charles H. Knight, Special Agent
A. L. Hannum, Internal Revenue Agent
Helen W. Brown, Recorder

Questions were asked by Special Agent Charles H. Knight, and answers were given by Mr. Funkhouser, unless otherwise specified.

Q. Mr. and Mrs. Funkhouser, will you please stand and raise your right hand? Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

A. Mrs. Funkhouser. I do.

A. Mr. Funkhouser. I do

* * * *

[Page 10]

Q. For what purpose did you use your first boat?

A. Mr. Knight, I bought 75 acres of ground on the water front, about a mile of water front, and I intended to develop that ground as water front development and I thought a boat would be helpful in promoting it.

Q. When did you purchase this land, this acreage you refer to?

A. I think it was in '39.

Q. Was that the Wilmer Estate?

A. Yes.

Respondent disallowed many thousands of dollars of expenses listed on the returns and confused the Jury with testimony such as the following:

* * * *

[TR. 207] Question by Mr. Green: Now Mr. Knight, will you look at the December page of Mr. Funkhouser's books for 1946.

A. Yes, sir.

Q. Now, I call your attention, particularly, to the column of miscellaneous property.

A. Yes, sir.

Q. What is the final figure in that column?

A. $7,053.95.

Q. Now, is that the figure that appears on the tax return?

A. That is correct, sir.

* * * *

Q. It is shown as a deduction in that amount?

A. It is shown on the taxpayer's income tax return. No, that is maintenance expense. Your Honor.

Question by the Court: Well, what would be the ordinary significance of miscellaneous property as a heading for deductions? I do not quite get that.

Statement by Mr. Green: I am sure I don't either, sir, to be honest with you. I don't know what he had in mind there.

Statement by the Court: Well, all right, go ahead and develop whatever point you have in mind, Mr. Green. Maybe we will understand it as we go along.

Q. However, Mr. Knight, is that figure that is shown on the books, on the return, as $7,053.95, as miscellaneous property deduction for 1946 the final twelve month figure as shown on the books?

A. That is right, the total, the final total, as shown on the books for the year 1946.

* * * *

[TR. 210]

Q. Now, how were you able to determine the source of that figure?

A. By going back and noting the ones which he had crossed off his records, and that amounts to a total of—that amount comes to $3,814.50, which he deducted from the $10,868, and arriving at $7,053,95.

Q. I don't quite understand what you mean. You mean he listed certain expenditures, or included certain expenditures, under the heading of miscellaneous property and then at the end of the year struck them out; is that correct?

A. That is correct, sir.

Q. Now, how many expenditures did he strike from the miscellaneous property column?

A. I can't say off hand except referring to approximately four, three or four—there were three, I think, to be exact, sir.

* * * *

[TR. 211]

Q. By the Court: Now, what is the significance, then of the matter?

A. By Mr. Green: My point is this, sir, with regard to this column, and to the other columns at the end of the year. Mr. Funkhouser ascertained that certain expenditures totaled $11,500 which heretofore had been included as expenses but should not be taken as expenses and, therefore, instead of showing a loss of some ten thousand dollars he showed a profit of $1,400 at one time.

Q. By the Court: He showed a loss of ten thousand dollars?

A. By Mr. Green: Instead of showing a loss of ten thousand dollars at the end of the year, he allotted certain expenditures as deductions, and he would have shown a loss of ten thousand dollars.

* * * *

[TR. 312]

Q. By the Court: Well, you say it is only part of your argument, but that is the only significance that I can see in any of it at the moment.

A. By Mr. Green: I say this, and like I mentioned to the jury in my opening statement, each of these items will be taken in conjunction with all the others. That must be done in order to get the significance of each and every item.

* * * *

[TR. 221]

Q. Now, Mr. Knight, the importance of that point you just testified to is that there were four entries in the miscellaneous column crossed out?

A. That is correct.

Q. Now, what is the total amount crossed out?

A. $4,315—$4,160 have been crossed out.

Q. $145 less than the $4,305 which was deducted; is that correct?

A. That is correct.

Q. Now, is it not true that several checks were—

Mr. Anderson: If Your Honor please, I don't think this proves anything. The figures are not corresponding in any way, and I don't think it proves anything.

The Court: Perhaps Mr. Green may help us by telling us the significance of these matters. I do not myself get them. I doubt that the jury does, but it may be that it is the basis of something later on.

By Mr. Green: If Your Honor please, we contend this: that in the year 1946 the taxpayer reported a net income of $1430, and then ascertaining what the expenses were he had a $1400 difference, and he deducted from the total expenses as shown by the books as shown at the end of the year the sum of $11,500, and I say two things, that when you look back to see which expenses were crossed out for the time in enumerating the deduction, it is indicated that at one time he was going to take off as expenses, but then he changed his mind particularly when he found that if he included them as expenses it would show a net loss for the year of some $10,000.

By the Court: Of course, that is an argument based on your conception of his mental intention. It is quite possible that there may be evidence that they were crossed out because he ascertained that they were mistakenly put there in the first instance. That would be the ordinary interpretation of it, apart from other evidence in the case which might lead to one being suspicious about the matter. I thought possibly you were going to make the point which perhaps is argumentatively open in the case that the items which have been crossed out are very, very similar to items which in other years have been crossed out, and that possibly requires some explanation as to the fact that they were included as deductions in 1945, and have been eliminated as not a deduction properly in 1946. You could argue that perhaps there is an inconsistency in that respect. That is all I see for the moment in the case, but

you have got these checks, whatever their significance is, before the Jury. Now let us go on to something else.

* * * *

Respondent just assumed that some taxes were due and so testified

[TR. 493]

Archibald L. Hannum, was called as a witness on behalf of the Government, and having been first duly sworn, was examined and testified as follows:

[TR. 493]

Q. Now, for the year 1943, Mr. Hannum, both the indictment and the Government program shows a corrected net income for Mr. Funkhouser of $14,467.57. Now, assuming that to be a correct income, have you computed the amount of tax that would be due and owing on that income for 1943?

A. I have.

Q. What is that amount, Sir?

A. $4,294.90.

Q. Now, in the year 1944, Mr. Hannum, the indictment alleges that Mr. Funkhouser had a correct net income of $16,533.00. Now, assuming that to be his correct income, have you computed the amount of tax due and owing from him?

A. On the $16,000.00?

Q. Yes.

A. On $17,000.00 I computed it. Isn't that your program?

Q. Now, assuming his correct income was $16,533.00, as alleged in the indictment for 1944, could you tell us what the tax due and owing on that amount would be?

A. I can.

Q. What is that amount?

A. $5,452.20.

Q. Now, the Government program for 1944, Mr. Hannum, shows a corrected net income of $17,649.19. Assum-

ing that to be correct, have you computed the tax that would have been due and owing thereon?

A. I have.

By the Court: Now you are confusing me. I do not know what you are talking about for the moment. You mean it changed between 1944 and 1945?

By Mr. Green: If Your Honor please, in 1944, 1946 and 1947 the figures shown on the Government program as a corrected net figure are slightly different from the figures stated in the indictment, and I was asking Mr. Hannum's tax computation of both the indictment figure and the figure appearing in our score sheet.

Respondent gave petitioner a bogus list of the questioned items for petitioners use in preparing for the criminal trial

[TR. 423]

Q. By Mr. Anderson: Now, Mr. Knight you were asked a long series of questions with respect to the allowance of interest and principal on certain mortgages of Mr. Funkhouser, and I show you a copy of the computation for the year 1943 which I believe you have.

A. That is correct, sir.

Q. Now, for example, in the year,—Well, I direct your attention to the Electrical Workers Benefit Association.

A. That is correct, sir.

Q. You have certain items in brackets. What is the significance of the brackets?

By Mr. Green: If Your Honor please, I don't mind Mr. Anderson asking any questions he wants to but the paper he has reference to is a preliminary work paper which I gave to him in connection with both mine and his preparation of the case and I don't think it is appropriate for him to use that in connection with the questioning of Mr. Knight, particularly in view of the fact ..."

By the Court: "Who gave what to whom? You gave what to whom?

By Mr. Green: "I gave to Mr. Anderson that and particularly in view of the fact that Mr. Knight didn't utilize a copy of it in connection with the basis of his testimony—"

By the Court: "Well, Mr. Anderson, I understand that you are asking him what is the significance of some notation on the paper which Mr. Green handed to you."

By Mr. Anderson: "I thought it had some significance a notation on the paper that was turned over to me and Mr. Knight."

By the Court: "I sustain the objection."

This entire case was handled by respondent's special agent, Charles H. Knight, and petitioner was continually referred to that agent for over seven years

Here is a copy of a letter referring Petitioner back to Charles H. Knight seven years after that agent began this case. It like all other inquiries was referred to this agent whose testimony has been quoted and who,

1. Made no audit or inquiry about former audits. [32a][1]
2. Made no tabulation or calculation. [32a]
3. Disallowed all automobile expenses in the entirety. [33a]
4. Made no inquiry about the particular items. [32a]
5. Assumed that taxes were due. [45a-46a]
6. Secured a fine and conviction on that assumption.
7. Opposed petitioners release from prison on parole after petitioner had served enough time in prison to become eligible for parole on the ground that petitioner had not paid his "assessed taxes" when he well knew that no taxes had been assessed. [Record of Parole Board]
8. Filed the tax liens and jeopardy assessments. [48a]
9. Seized and took all of petitioner's property and money without making any audit or tabulation or assessment. [32a]
10. Testified falsely as to date of sale of some of petitioner's property. [35a-36]
11. Testified falsely as to petitioner's contentions as to the use of some of the property. [36a-41a]
12. Worked overtime on the case "to supplement the family income". [20a] But Petitioner was referred to that same agent for over seven years.

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[1] All References are to pages of this appendix.

U. S. TREASURY DEPARTMENT
OFFICE OF THE DIRECTOR OF INTERNAL REVENUE
Washington, D. C.
March 4, 1954

Mr. Robert E. Funkhouser,
5315 Colorado Ave. N. W.,
Washington, D. C.

In re: Robert E. Funkhouser, et ux.,
Docket No. 48119

Dear Mr. Funkhouser:

Reference is made to your recent letter addressed to the Commissioner of Internal Revenue requesting information as to the amount of collections made on the accounts against you and the basis on which jeopardy assessments were made for the years 1941 through 1947.

The writer has furnished you with a memorandum of each payment received on your accounts with the exception of the two enclosed with this letter which were received March 4, 1954. The total amounts to $30,565.47 and has been credited as shown below.

1941 IT. Spl. 11 OOP 12/5/52, Tax $7,608.55 Interest $338.38 Total $7,946.93.
1942 IT. Spl. 1102P 12/6/52, Applied against tax $22,618.54, Liability $32,071.85.

If this does not agree with your records I shall be glad to check each collection with you upon your call at our office, Room 1116, Int. Rev. Bldg.

The matter of the jeopardy assessments should be taken up with Special Agent Charles H. Knight, Internal Revenue Building, Washington, D. C., his file SI-33405-P.

Yours very truly,

JAMES F. PHILLIPS
James F. Phillips,
Collection Officer.

To force this settlement respondent contended that he was disclosing basis of assessment

U. S. TREASURY DEPARTMENT
OFFICE OF THE DIRECTOR OF INTERNAL REVENUE
Washington 25
Feb. 15, 1955

Mr. Robert E. Funkhouser
5315 Colorado Avenue, N. W.
Washington 11, D. C.

Dear Mr. Funkhouser:

This is in reply to your letter of February 6, 1955, addressed to Assistant Commissioner Webster, in which you request the Internal Revenue Service to furnish you certain lists or other data bearing upon the determination of your income tax liability for the years 1941 through 1947. These years were closed by a stipulation filed in the Tax Court in your case, bearing Docket No. 48119.

As was stated to you during the recent conference held here in the office of the Appellate Division, at which your representative, Mr. Warren Roberts, was present among others, complete data showing how your liability was arrived at is in possession of your counsel of record. Furthermore, your counsel of record always has had this information, since it was the basis upon which Mr. Llewellyn Luce and Mr. Roberts, representing you, worked out the settlement of the case with respresentatives of the Internal Revenue Service.

Under these circumstances, your proper course of action would be to make arrangements to secure the material you desire from your own counsel.

Very truly yours,

C. W. STOWE
Acting Assistant Commissioner
(Operations)

U. S. TREASURY DEPARTMENT
OFFICE OF THE DIRECTOR OF INTERNAL REVENUE
Washington, D. C.
March 4, 1954

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The matter of the jeopardy assessments should be taken up with Special Agent Charles H. Knight, Internal Revenue Building, Washington, D. C., his file SI-33405-F.

Yours very truly,

JAMES F. PHILLIPS
James F. Phillips,
Collection Officer.

To force this settlement respondent contended that he was disclosing basis of assessment

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OFFICE OF THE DIRECTOR OF INTERNAL REVENUE
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Feb. 15, 1955

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Under these circumstances, your proper course of action would be to make arrangements to secure the material you desire from your own counsel.

Very truly yours,

C. W. Stowe
Acting Assistant Commissioner
(Operations)

But the settlement and stipulation was forced on petitioner without respondent disclosing the basis of the assessment of these taxes

Respondent's agent Butrum testified before the Tax Court

[TC 27]

Question by Mr. Waring: Will you state to the Court the basis of settlement of the item called property maintenance as briefly as you can?

Answer by Mr. Butrum: That was the error that caused the greatest amount of confusion. My instructions to the boys were to total all of these amounts in this account as to which there was a dispute as to whether they were legitimate expenses or whether they were ever any expenditures. The total of that was approximately $68,000. and realizing the enormity of attempting to analyze some 20 or 30 thousand individual items I told them we would adopt the theory of the cohen rule and split it down the middle.

* * * *

[TC 38]

Q. And each figure contained thereon with respect to the column marked "balance in dispute one hundred per cent", each of those items were discussed in the conference at which Mr. Funkhouser was present; is that correct?

A. That is correct. Now I personally didn't do this. My expression was "see that that is done and when you reach a point where you are unable to settle any more of these items let me have the total." And that was the problem that I was confronted with. This $68 thousand in dispute. "What shall we do then?" And I said "Split them down the middle," "Let us get rid of the case."

* * * *

[TC 34]

Q. By Mr. Funkhouser: Did you ever give me a list of any of the items that were disallowed in this case?

A. Mr. Funkhouser, I told you a number of times we did not give you any; neither do we intend to. We have a total of $68,000 in expense covering probably 10 thousand items. We say for purposes of settlement we will allow 50 and disallow 50. There is no attempt to pick out and say here is 5 thousand. Half of this total over here and allow you these; and another total over here to arrive at this figure. We take the total sum and apply in what in our judgment is a reasonable figure to apply.

[TC 37]

Question by Mr. Funkhouser: Have you ever given me any items—

Answer by Mr. Butrum: I have not given you any list of any items.

Q. Have I ever requested you to give them to me?

A. You most certainly have.

Q. And I have been refused?

A. Right.

Q. Have you ever given me any of those items?

A. I have not given you anything, Mr. Funkhouser.

And the counsel who signed the stipulation testified before the Tax Court

[TC 52]

Q. Mr. Luce, did you ever give me any list of the disallowed items in this case?

A. Mr. Funkhouser, I never had a list. What we gave you and what you looked over and what you prepared yourself, helped prepare, was this long analyses, prepared by Mr. Roberts in these conferences of these checks right down the line. Now I will tell you why I didn't give you a list: Because we had this analyses and in the second place because the government didn't give me any list; and as a matter of fact, they didn't have a list and didn't make it up and the settlement was finally effected as Mr. Butrum described it, by an arbitrary decision of these items in dispute. So I didn't have any list of them; I just had the figure.

Respondent told the Tax Court that he found all gross income reported and 95 per cent of all expenses were found allowable and were allowed. The official report of proceedings before the Tax Court. Docket No. 48119 Record

[TC Page 13]

By Mr. Waring: Counsel for Respondent: "This gentleman for the years involved in this proceeding reported a gross income of $492,991.10 on returns filed by him".

[TR. 355]

Question by Mr. Anderson: You made an investigation as to all of the businesses Mr. Funkhouser was in?

Answer by Mr. Knight: To the best of my knowledge, yes, sir.

Q. And as to the sources of his revenue, do you recall finding those in Mr. Funkhouser's records?

A. The rental income and the interest income and the salaries received from the Independent Laundries for the year 1943.

Q. So that what the Court said, is it not the point that there is no hidden income but the alleged improper deductions?

A. That is correct.

* * * *

[TR 21]

Question by Mr. Green: And then the last page has a listing of the receipts by months from each of the rental properties; is that correct?

Answer by Mr. Knight: That is correct, sir.

* * * *

Respondent found all expenses listed and reported in all years

[TR 264]

Question by Mr. Green: Now, Mr. Knight, Mr. Funkhouser's Ledger for 1947 was similar to the ledgers for prior years and kept in the same manner?

A. That is correct.

Q. Did you check the 1947 income tax return with the 1947 ledger?

A. I did, yes.

Q. Can you state whether or not the return was prepared from the ledger?

A. That is right.

Q. And is it true that the items of expense shown on the ledger for 1947 ultimately did get into the income tax return of 1947?

A. Yes.

The Court: Well, it seems to be the same general principle.

* * * *

[TR 353]

Q. By Mr. Anderson: Now, Mr. Knight, Mr. Funkhouser's check stubs contained an itemization of practically all these transactions; isn't that true?

A. That is correct, sir.

Q. In other words, the check stubs are the records which contain the detailed entries of the various transactions?

A. That is not correct in every detail.

Q. I didn't say it was correct, but I say it contained the detailed entries of the transactions?

A. Generally, yes, sir.

Q. And from the check stubs they are carried over into what has been called the ledger, and what I will call the same thing. From the check stubs there is carried over in a summarized form the breakdown of the check stubs into these categories as set forth in this expense ledger; is that right?

A. Generally, yes, sir.

Q. In other words, there would be summaries of these transactions set forth in the stubs of each detailed transaction which later was set up under the various headings in Mr. Funkhouser's ledger?

A. Generally, yes, sir.

And respondent told the Tax Court 95 per cent of the items were found allowable

[TC Page 14]

By Mr. Waring: "Every check that he was able to produce, and he produced 95 per cent of them, were itemized by numbers, were placed in various categories. Those were allowed. There is no question about it. They were allowed as deductions from gross income.

"Finally it came to the questionable items, all of which Mr. Funkhouser knew about, all of which were discussed in the conferences; all of which Mr. Luce knew about; all of which Mr. Roberts knew about. There was no hiding, no misunderstanding in those conferences.

This has been a most unusual case as evidenced by our office granting 20 conferences just in this one case. We had to do it because of the attitude of the petitioners at all times in this case. We would ask him to discuss a check on the back of which, at least in one case, was 59 items; and that check totaled about $300. They were all in his handwriting (R. 15)

What did these items represent? They go from 25 cents up to $400-some in some cases. I honestly believe that there is at least 10,000 income items in dispute in this case because of him and nobody else, represented by these 3,000 checks."

* * * *

Respondent never made up any list of the items disallowed

[TCR p. 22]

Roy Butrum, was called as a witness, by Respondent, and having been duly sworn, was examined and testified as follows:

* * * *

Direct Examination by Mr. Waring:

[TC 24]

By Mr. Butrum, it is seldom that I sit in conferences unless there is a dispute of some kind which would war-

rant my attending. And the reason I started on this one was that it was an old case, involving a substantial sum of money, and the Commissioner was desirous of eliminating these cases from our inventory prior to December 31. And when they started consideration of the case I was advised by Mr. Smith, Technical Advisor who was handling the case, that that was a very complex set of facts, and I agreed to assign him an order to assist him in reviewing the voluminous trial. When they told me what they had discovered I deemed it advisable that I sit in one or two of the conferences to determine what the possibilities were of effecting eventual settlement of the case.

* * * *

[TC 26]

Q. How many checks or various items do you believe were involved in this proceeding insofar as they related to property maintenance?

A. I don't know exactly how many were in dispute in the suit-case that I saw which contained the checks. There were approximately 7,000 I judge. Now, as to how many of those 7,000 were actually in dispute I am unable to state.

Q. While you were at the conference was every item in dispute discussed not only with Messrs. Funkhouser, Luce and Roberts, but were discused among the various people?

A. Every check number, and the accounts underlying it were discussed.

Q. And Mr. Funkhouser was fully advised with respect to each item, and he was the one who explained what they were issued for, wasn't he?

A. So far as those discussions occurred while I was present.

Q. Will you state to the Court the basis of the settlement of the item called Property Maintenance as briefly as you can?

A. That was the error that caused the greatest amount of confusion. My instructions to the boys were to total all of these amounts in this account as to which there was a dispute as to whether they were legitimate or whether they were ever any expenditures. The total of that was approximately $68,000.00. *And realizing the enormity of attempting to analyze some 20 or 30 thousand individual* items I told them we would adopt the theory of the Cohen rule and split it down the middle.

• • • •

[TC 34]

Cross Examination

By Mr Funkhouser:

Q. Did you ever give me a list of any of the items that were disallowed in this case?

A. Mr. Funkhouser, I told you a number of times we did not give you any; neither do we intend to. We have a total of $68,000.00 in expense covering probably 10 thousand items. We say for purposes of settlement we will allow 50 and disallow 50. There is no attempt to pick out and say here is 5 thousand. Half of this total over here and allow you these; and another total over here to arrive at this figure. *We take the total sum and apply in what in our judgment is a reasonable figure to apply.*

Q. Then this is just in your judgment a reasonable figure to allow?

A. That is right. This figure here, this thirty-four; 50 percent.

• • • •

[TC 35]

Q. What does this column mean? "Disallowed by Agent, other than Criminal Fraud", Totaling $103,720.21? What does that column mean to you?

A. These are the items that were disallowed by the Special Agent, or Revenue Agent, in addition to what he

designated as Criminal Fraud items in the Criminal proceeding.

Q. Have you ever given me any of those items?

A. I have not. We did not have the Criminal Case. We had nothing to do with the criminal prosecution.

Q. Mr. Butrum, what does this column headed "Criminal Fraud" mean to you?

A. *Well, I don't know why that column is in there at all. As a matter of fact; it is totally meaningless so far as our settlement was concerned.* Whether you were or were not guilty of fraud with respect to particular items in your Criminal Case, was no concern to me in settling your Civil Tax liability.

* * * *

[TC 37]

Q. Have you ever given me any items—

A. I have not given you any list of any items.

Q. Have I ever requested you to give them to me?

A. You most certainly have.

Q. And I have been refused?

A. Right.

* * * *

Q. May I ask you about one more column here. This column headed "Disallowed by Agent", What does that column mean to you?

A. Just exactly what it imports, that *those are the total amount disallowed by the Revenue Agent in his report.*

Q. Have you ever given me any of those items?

A. I have not given you anything, Mr. Funkhouser.

* * * *

[TC 38]

Redirect Examination

By Mr. Waring:

Q. Mr. Butrum, the figures shown on Txhibit 1, which you have in front of you, were obtained from a check analysis summary, were they not, sir?

A. That is right.

Q. And each figure contained thereon with respect to the column marked "Balance in Dispute 100%" each of those items were discussed at the conference at which Mr. Funkhouser was present; Is that correct?

A. That is correct. Now I personally didn't do this. My expression was "See that this is done and when you reach a point where you are unable to settle any more of these items, let me have the total". And that is the problem that I was confronted with. This $68 thousand in dispute. "What shall we do then?" And I said "Split them down the middle." "Let's get rid of the case".

The counsel who signed the stipulation never had a list of the disallowed items

[TC 40]

LLEWELLYN A. LUCE, was called as a witness for and on behalf of the Respondent, and having been duly sworn, was examined and testified as follows:

By Mr. Waring:

Q. You are attorney-at-law, are you not, sir?

A. Yes, sir.

Q. Did you have a client by the name of Robert E. Funkhouser, sir?

A. I did, sir.

Q. And did he employ you with respect to his income tax case, Docket Number 48119 relating to the years 1941-1947?

A. He did, sir.

Q. In connection with that case, will you tell the Court briefly what you did to develop the facts in that case, the conferences and discussions which you had with your client with respect to settlement negotiations? I will let you take it from there. You go ahead, sir.

A. Mr. Waring, I would like to develop this first if I may by a statement. You notified me that I would be

subpoenaed as a witness for the Government and then I agreed to come here without a subpoena at the request of the Government; is that right?

Q. That is correct, and I might state that for the record. I am sorry I did not do it. I told you very clearly that if you didn't volunteer to come I would issue a subpoena; and I had a subpoena already typed for your appearance here this morning.

A. I want to make further statement in the interest of Mr. Funkhouser, in the interest of myself, that I have no spleen against Mr. Funkhouser. As far as Mr. Funkhouser and I are concerned, we are friends. We had some very violent arguments a time or two; but I want to state to this Court that I represented Mr. Funkhouser the best I was able and to the full extent of my ability.

Now, Mr. Waring, I will answer your question stating this: You want an outline, what we did with respect to this case. Now, in the first place I prepared the petition in this case. I feel, as a lawyer, that a very comprehensive petition was prepared. I feel it was very satisfactory to Mr. Funkhouser. I prepared the answer, or reply, to the government answer.

I arranged with Mr. Butrum and yourself for this long series of conferences which were held, which I supervised. I employed Mr. Warren Roberts, attorney-at-law, who helps me in many of my cases, to sit in with the government representatives and with Mr. Funkhouser, to go over these checks with the government representatives check by check.

Mr. Funkhouser, at my request, and also in accordance with his own best judgment, segregated these checks year by year, these checks and other items, not checks, white slips, which made up a part of these miscellaneous deductions. These checks Mr. Funkhouser brought to my office. There were two or three suitcases full of these checks.

Then these deductions being in dispute, we went down with the Bureau representatives, Mr. Roberts went down

with Mr. Funkhouser and as far as possible went over with Mr. Smith and Mr. Able these checks, item by item.

Then I came into the picture and argued as best I could, and I was not mealy-mouthed about the proposition. I spoke right straight to the shoulder to the government representatives about the allowance of these checks. And there were other items which I think we should take into consideration.

Now you asked me what I did.

The deficiencies for all of these years, penalties, and 25 per cent penalties for the years 1941 to 1947 inclusive amounted to $272,521.19, plus interest. The taxes, interest, and penalties so proposed by the government were settled under this stipulation and agreement to stipulate for the figure of $107,955, a saving to the taxpayer, from the determination of the Commissioner; a saving amounting to $164,566.01. An actual reduction of taxes was made. I felt I had done a pretty good job.

* * * *

[TC 49]

Now Mr. Funkhouser was present at these conferences and explained, offered the testimony about the checks. It wasn't testimony under oath, but it was explanation.

Then with respect to these checks and other pieces of paper representing each transaction, I might make this clear as I get the picture: A portion of those, all the checks in dispute, had been disallowed by the examining officer on the ground that there were fraudulent items. *The Bureau refused to concede any of those items that had been labeled by the special agent, and Intelligence agent, as fraudulent items, although they were discussed.*

* * * *

[TC 51]

Now I agree with Mr. Funkhouser in this one respect—Well, in many respects, I agreed with him so completely that we got these answers that I describe. But I feel that this man has had an awful hard time. Those jeopardy as-

sessments were terrific. The subsequent attachment of his bank account was terrific. He has been under a strain ever since that criminal proceeding in Baltimore five or six years ago.

* * * *

[TC 52]

Now here is what I was afraid of: If he lost that case or lost some of these other issues, I was afraid it would break him.

* * * *

Cross Examination

By Mr. Funkhouser:

Q. Did you ever give me any list of the items that were disallowed in this case?

A. Mr. Funkhouser, I never had a list. What we gave you and what you looked over and what you prepared yourself, helped prepare, was this long analysis, prepared by Mr. Roberts in these conferences of these checks right down the line.

Now I will tell you why I didn't give you a list; because we had this analysis and in the second place *the government didn't give me any list; and as a matter of fact, they didn't have a list and didn't make it up and the settlement was finally effected as Mr. Butrum described it, by an arbitrary decision of these items in dispute. So I didn't have any list of them, I just had the figure.*"

[TC 55]

Warren G. Roberts, was called as a witness by and on behalf of Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Warring:

Q. Mr. Roberts, you are a member of the bar, are you not, sir?

A. I am.

Q. In connection with that association did you have occasion to work on the case of Robert E. Funkhouser, Docket No. 48,119, pertaining to the years 1941 to 1947, inclusive?

A. Yes, I did, Mr. Warring.

Q. Can you in a few words, to save time, tell the Court the scope of your authority with respect to this case, number of conferences held and your associations with Mr. Funkhouser personally in respect to the adjustments made in this case?

Now, you go ahead and I will take up from where you leave off.

A. Let me explain.

Q. Just before you do, I want to say for the purpose of the record, that I asked Mr. Roberts to appear and told him that if he did not appear that I would subpoena him. He told me that he would voluntarily come without a subpoena. That is the only reason he has not been subpoenaed as a witness for the Respondent.

Now, you go ahead.

• • • •

[TC 57]

The total number of items in dispute in this case I would judge to be about fourteen thousand items, most of them small.

• • • •

[TC 59]

There was a certain number of items that the agent had designated as Criminal Fraud items. Whether they were or weren't was not determined.

In any event, the Government would not give us any part of those, and my understanding was that they were disallowed in toto. That was that.

• • • •

Cross Examination

By Mr. Funkhouser

[TC 66]

Q. Mr. Roberts, did you ever get a list of the fraud items in this case?

A. Now, I must say that I never did get a list of them ... the answer to that is No.

Q. Did you ever get a list from the Government of the items that made up the fraud?

A. This not being a criminal trial, No, we didn't, and it didn't seem to be necessary, I might add.

Q. It wasn't necessary in your opinion?

A. No. And besides it wouldn't be furnished if we asked for it.

* * * *

[TC 69]

Q. Were you furnished by the Government with any list of items that had been disallowed as interest in those years?

A. No, there was no separate list of that given.

* * * *

Respondent told the Tax Court that he had found all of the gross income reported, that 95 per cent of all expenses were found allowable and were allowed, and that the other five per cent were reported in too much detail to count, list or attempt to analyze.

[TC 13]

By Mr. Waring: This gentleman for the years involved in this proceeding reported a gross income of $492,991.10 on returns filed by him.

[TC 14]

By Mr. Waring: *Every check that he was able to produce, and he produced 95 per cent of them*, were itemized by numbers, were placed in various catagories. *Those were*

allowed. There was no question about it. They were allowed as deductions from gross income.

Finally it came to the questionable items, all of which Mr. Funkhouser knew about, all of which were discussed in the conferences; all of which Mr. Luce knew about; all of which Mr Roberts knew about. There was no hiding, no misunderstanding in these conferences.

This has been a most unusual case as evidenced by our office granting 20 conferences just in this one case. We had to do it because of the attitude of the Petitioners at all times in this case. We would ask him to discuss a check on the back of which, at least in one case, was 59 items; and that check totaled about $300. They were all in his handwriting.

What did these items represent? They go from 25 cents up to $400-some in some cases. I honestly believe that there is at least 10,000 income items in dispute in this case because of him and nobody else, represented by these 3,000 checks.

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893903—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 232

ROBERT E. FUNKHOUSER AND ELEANOR E. FUNKHOUSER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Tax Court rendered no opinion. The opinion of the Court of Appeals (Pet. 3a–4a) is reported in 226 F. 2d 910. The opinion denying a rehearing (Pet. 7a–8a) is reported in 231 F. 2d 657.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1955. (Pet. 3a.) A petition for rehearing was denied on April 9, 1956. (Pet. 7a–8a.) The petition for a writ of certiorari was filed on July 5, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the court below erred in affirming the order of the Tax Court declining to vacate its decision which had been entered pursuant to an agreement of the parties in settlement of the case.

STATEMENT

On February 4, 1953, the Commissioner duly served on the taxpayers, Robert E. Funkhouser (referred to hereinafter as the taxpayer) and his wife, Eleanor E. Funkhouser, a statutory notice of deficiency with respect to their income tax liability for the calendar years 1941 through 1947, determining deficiencies of $179,391.73 and $93,129.46 in penalties. (R. 10.)[1] On April 29, 1953, the taxpayers filed a petition for redetermination by the Tax Court. (R. 7.) Thereafter, extensive negotiations took place which culminated in a settlement of the case, which was embodied in a stipulation between the parties filed with the Tax Court on November 16, 1954, for the entry of a decision. (R. 11–14.) On November 24, 1954, the Tax Court entered its decision in accordance with the written stipulation of the parties. (Pet. 1a–2a.)

On February 23, 1955, the taxpayers filed a petition for review by the Tax Court, and on March 16, 1955, a hearing was held thereon. (R. 8.) The Tax Court, construing this document in a manner most favorable to the taxpayers, treated it as a motion to vacate and set aside its decision of November 24, 1954. It lim-

[1] Record references are to the appendix to the Commissioner's brief in the court below.

ited its hearing thereon to the question whether the action of the taxpayers' counsel in stipulating for the entry of decision exceeded the scope of his authority or whether there was any fraud, over-reaching, or other grounds for vacating its decision.[2] (R. 14–19.) At the hearing it was developed that the taxpayer was represented by an attorney, Lewellyn A. Luce, who was assisted by another attorney, Warren G. Roberts, in the negotiations leading to the settlement of the case. (R. 24, 33–34.) The taxpayer was granted some nineteen formal conferences with representatives of the Commissioner, at most of which he was present along with his counsel. (R. 20–21.) The taxpayer took an active part in the discussions and was fully advised as to the basis of the settlement and the various items involved. (R. 22–24, 28–33, 35–42.)

Mr. Luce, the taxpayer's attorney, testified that the stipulation, pursuant to which the decision of the Tax Court effecting the settlement of the case was entered, was fully discussed with the taxpayer; that the taxpayer was given an opportunity to examine it thoroughly; and that the taxpayer specifically directed him to sign the stipulation and file it. (R. 29, 30.) The settlement made in the case enabled the taxpayer for $107,955 to dispose of, without litigation, a liability for taxes and penalties determined against

[2] None of the matters relating to the taxpayer's criminal prosecution for income tax evasion referred to in the petition for certiorari (pp. 3–5, 8, 11, 12, 14–15) and set forth at length in the appendix thereto (pp. 21a–47a, 52a–53a) were made a part of the record in this proceeding, and therefore were not referred to by the Tax Court or the court below.

him in the statutory notice of deficiency in the amount of $272,521. (R. 10, 26.) Mr. Luce testified that he recommended acceptance to the taxpayer because he felt it was a good settlement, and not "on account of any lack of fee or anything of that kind." (R. 32.) Chief Judge Kern, who presided at the Tax Court hearing (R. 51), specifically inquired of the taxpayer whether he wished to give any testimony in contradiction of that given by Mr. Luce, to which the taxpayer replied, "I have no argument with what Mr. Luce testified to" (R. 33). The Tax Court concluded that no basis had been established for vacating and setting aside its decision entered on November 24, 1954, pursuant to stipulation of the parties, and denied the taxpayers' petition. (R. 50–51.)

The court below, on November 7, 1955, affirmed the Tax Court's order refusing to vacate its decision. (Pet. 3a–4a.) The taxpayers subsequently filed a petition for rehearing based upon alleged newly discovered evidence, upon which briefs were filed and oral argument had. On April 9, 1956, rehearing was denied by the court below. (R. 5a–6a, 7a–8a.)

ARGUMENT

The decision below is correct. The facts detailed above make it clear that petitioners' allegations of injustice are wholly without foundation. Their claims of fraud and coercion were painstakingly reviewed by the courts below, and were found to be lacking in substance. No conflict in decisions is asserted, and no other grounds for further review exist.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys.

AUGUST 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 232

ROBERT E. FUNKHOUSER AND ELEANOR E. FUNKHOUSER,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITIONERS REPLY TO RESPONDENTS BRIEF IN OPPOSITION TO PETITION

Respondent's argument and conclusion in the brief he filed in opposition to the petition in this case are based on his incorrect quotation of the recorded testimony.

Respondent, in his brief (Page 4.) quotes the counsel who signed the stipulation as testifying that he did not recommend the acceptance "On account of any lack of fee or anything of that kind" (Respondent's brief in opposition to this petition, page 4.) and then Respondent quotes the Petitioner as replying to the Tax Court

judge as follows "I have no argument with what Mr. Luce testified to". (Respondent's brief in opposition to this petition, page 4.)

Respondent's quotations are deceptive, incomplete and quoted out of context. Respondent's references to the record are also deceptive, in that his quotations, such as (R. 32.) do not refer to the official record of the testimony before the Tax Court but they refer to Respondent's own brief in which he printed excerpts from the record, which he filed in the Court below (See the note at the bottom of page 2 of Respondent's brief in opposition to this petition) and they are not *correct quotations* of the official record.

The official Record of the hearing before the Tax Court on March 16, 1955 *correctly quoted* is as follows:

(Official Record of Tax Court Hearing Page 52)

Q. Mr. Luce, did you ever give me any list of the disallowed items in this case?

A. Mr. Funkhouser, I never had a list. What we gave you and what you looked over and what you prepared yourself, helped prepare was this long analyses, prepared by Mr. Roberts in these conferences of these checks right down the line. Now I will tell you why I didn't give you a list: Because we had this analyses and in the second place because the government didn't give me any list; and as a matter of fact they didn't have a list and didn't make it up and the settlement was finally effected as Mr. Butrum described it, by an arbitrary decision of these items in dispute. So I didn't have any list of them, I just had the figure.

MR. FUNKHOUSER: No further questions.

MR. WARING: You may be excused.

THE COURT: Step down.

> THE COURT: May I ask Mr. Funkhouser if he has any testimony, whether he wishes to give any testimony in contradiction of the testimony of Mr. Luce who has just testified, with particular reference with his employment as counsel, his authority to act, his consultation with you in regard to the settlement and his acknowledgment of you with regard to the settlement figure?
>
> MR. FUNKHOUSER: I have no argument with what Mr. Luce testified to.

That testimony, when correctly quoted, shows that Mr. Luce had just testified that Respondent has assessed these taxes and penalties and forced this "arbitrary decision" without ever making up, or having any list of the items on which the stipulation and decision were based (R. 53.)[1] (Pet. 61a.)[2]

This is an important case. If this Court permits this decision to stand, and permits Respondent to assess these taxes and penalties and force their payment as described by him in his testimony as recorded in this record then every taxpayer (everyone in the United States will have lost his liberty and property). If this decision is not reversed by this Court then the record will show that fourteen years after the taxpayer filed income tax returns in which he reported all of his gross income and all of his expenses, Respondent, without making any inquiry about the particular items, inquiring about the specific checks, making any audit, tabulation, calculation, count, list or any attempt to analyze the items or estimate the number of items

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[1] Record References (R. 53.) used in this brief are to the official Record of the Hearing before the Tax Court on March 16, 1955.

[2] References to the Petition (Pet. 61a.) are to the Petition filed in this Court in this case.

involved, forced this "arbitrary decision" by having the taxpayer fined, imprisoned, and kept in prison without parole for not paying the taxes Respondent proposed to assess, then making a dozen different claims and placing assessments, attachments and liens on all of the taxpayer's property and seizing and taking all of his property and money. This decision was so forced by Respondent as is clearly shown by his recorded testimony.

Respondent's testimony shows that Respondent testified that he found all of Petitioners gross income reported in the income tax returns filed (R. 13.) (Pet. 25a), 31a, 63a.) and that all expenses were reported and "that 95 per cent of those expenses was found to be allowable. Those were allowed. There was no question about it. They were allowed as deductions from gross income". (R. 14.) (Pet. 31a, 64a.) and the other 5 per cent of the expenses were reported in such great detail that they were never even counted and no list was ever made of them. (R. 14-15, 34, 26, 57, 43, 27, 53.) (Pet. 6, 7, 31a-47a, 50a-61a, 62a, 63a-64a.) There was no question about this. It was repeated over and over again.

Respondent's testimony shows that the items on which the stipulation and decision were based were not even counted or any "attempt made to analyze them" (R. 27.) (Pet. 50a.) and Respondent's witnesses just estimated them to number:

3,000 as estimated by Mr. Waring (R. 15.) (Pet. 7, 64a.)

7,000 as estimated by Mr. Butrum (R. 26.) (Pet. 55a.)

10,000 as estimated by Mr. Waring (R. 15.) (Pet. 64a.)

14,000 as estimated by Mr. Roberts (R. 57.) (Pet. 62a.)

2 or 3 suitcases full as estimated by Mr. Luce (R. 57.) (Pet. 59a.)

20 or 30 thousand as estimated by Mr. Butrum (R. 27.) (Pet. 56a.)

The record shows that Respondent testified that he not only made no list or count of the items he disallowed for the assessment of these taxes and penalties but that he also made no "attempt to analyze some 20 or 30 thousand individual items" on which he based his assessment (R. 27.) (Pet. 56a.) nor did he make any audit, calculation or tabulation (Pet. 31a-32a.) or any inquiry about the particular items on which the decision was based (Pet. 32a.) or any inquiry about the particular checks (Pet. 32a.) and he testified that he disallowed many allowable items such as "all automobile expenses in the entirety" (Pet. 33a.) items never expensed (Pet. 33a.) disallowed checks for depreciable items but allowed no depreciation on them (Pet. 34a.) and knowingly testified falsely as to the date of the sale and as to Petitioner's contentions as to the use of some of the property (Pet. 35a-41a.) and then he made no audit, tabulation or calculation (Pet. 31a-32a.) but just "assumed" that some taxes might be due (Pet. 45a-46a.) and on that "assumption" he based the assessments he made in this case some fourteen years after the returns had been filed.

The record shows that without doing any of those elementary things for the proper assessment of any taxes and penalties Respondent then used the strongest kind of pressure to force the signing of the stipulation which he desired (R. 25.) Respondent had Petitioner fined $25,000, imprisoned, and kept in prison

without parole after Petitioner had served enough time in prison to become eligible for parole on Respondent's complaint that Petitioner had not paid the taxes he proposed to assess (See record of Parole Board in Criminal Case No. 72194.)

Respondent then, to force this settlement, levied jeopardy assessments, attachments, tax liens, and seized and took all of Petitioner's property and money, leaving Petitioner without any credit or money with which to pay counsel for assistance in defending this action.

Respondent seized and took all of Petitioner's money and refused to account for it or tell Petitioner how he had applied the money and the settlement was forced and the case closed by Respondent under his false assertion that "complete data showing how the liability was arrived at was in the hands of the counsel" (Pet. 49a.) and this when Respondent well knew that no such data had been made up, or was available, or was in the hands of the counsel (R. 52-53.) (Pet. 56a, 57a, 61a.) and (R. 34, 36, 37.)

Respondent knew such contention was false when he made it and it was made to force the stipulation and decision complained of.

Respondent repeatedly refused to give Petitioner any accounting as to how he had applied the money he had seized and taken to force the stipulation until after Petitioner had appealed to the President of the United States, and then Respondent admitted that he had made mistakes in the application of the money in *each and every one of the years*, and he then refunded a part of the money while the case was pending in the Court below (See Respondent's brief in opposition to the rehearing in the Court below, pages 12-13.) and

(Petitioner's reply brief to the petition for rehearing in the Court below, appendix 17, 19, 20.)

The pressure Respondent applied to force the settlement was described by his witness Luce as "terrific" (R. 51.)

Respondent then set up a dozen different sums as the amounts he claimed due and to which he proposed to apply the money he had attached and seized (Petitioner's brief in the Court below, pages 38-39.)

Respondent set up each of those sums and used them forcefully to force Petitioner's counsel to sign the stipulation for the settlement complained of so that he could "eliminate this case from our inventory prior to December 31" (R. 35.)

Respondent assessed these taxes and penalties as he testified in the Tax Court without making any analysis, count, tabulation or list. He described the method he used as "We take the total sum and apply in what in our judgment is a reasonable figure to apply" (R. 35.) (Pet. 56a.) and thus he forced the signing of the stipulation and the decision complained of on November 16 as he testified was desired by the Commissioner (R. 25.)

Petitioners contend that no tax collector should be allowed to assess and force the payment of taxes and penalties as described by Respondent in his testimony quoted above. That the fine, imprisonment, assessments, jeopardy assessments, liens, attachments and seizure of the property and money were just successive and cumulative steps taken by Respondent to force the signing of the stipulation for the forced and "arbitrary decision". (R. 52-53.) and that the 26 items com-

plained of on pages 8-10 of Petitioner's Reply brief in the Court below were all parts of Respondent's considered plan to force the stipulation "prior to December 31" (R. 25.)

The record shows (R. 52-53.) that Respondent's argument and conclusion in his brief in opposition to this petition are based on his erroneous quotations from his own brief which he filed in the Court below and are not based on a correct quotation of the record and testimony before the Tax Court. They are misleading and without merit.

Respondent's assessment of taxes and penalties of $272,521.00 which he testified he assessed without making any audit, tabulation, calculation, count, list, analysis or estimate of the number of items involved is fantastic.

The fine, imprisonment, dozen different assessments, liens, attachments, seizure of the property and money is incredible.

Respondent's testimony that he made mistakes in the application of the seized money in each and every one of the years is ridiculous.

Respondent's statement that "complete data showing how your liability was arrived at is in possesion of your counsel of record " is false (Pet. 49a.) and proved false by the testimony of two of his own witnesses, Butrum and Luce (R. 34, 36, 37, 52, 53.) (Pet. 50a, 52a.)

Unless this Court reverses this decision Respondent can, as he did in this case, force any taxpayer to sign stipulation for the assessment of taxes and penalties on this basis. And without making up any list of the

items Respondent in this case took over the counsel as his witness, and had him testify against his client before the Tax Court (R. 41.) and (Respondent's brief in opposition to this petition, page 3.)

The counsd testified that he consented to testify as Respondent's witness against his client in support of this "arbitrary decision" assessing these taxes and penalties which were based on a "figure" which neither he nor Respondent understood or agreed upon, and which Respondent's testimony repeatedly shows was not based on any list, tabulation, computation, inquiry or any attenpt to analyze the items on which it was based.

Counsel testified that "I didn't have any list of them; I just had the figure".

Respondent's testimony shows that the "figure" set up by Respondent in the stipulation and in the Tax Court decision was never a definite "figure," and was never agreed upon, but was just whatever "figure" Respondent chose to put down, and he put down a dozen different figures; among them as the amount he testified was agreed upon:

$17,965.78 on page 13 of the Record (R. 13.)
$74,853.81 on page 14 of Respondent's brief in opposition to the rehearing in the Court below.
$107,995.00 on page 3 of Respondent's brief in opposition to this petition.
$138,609.93 on page 14 of Respondent's brief in opposition to the rehearing in the Court below.

Those are only four of the dozen different figures set down by Respondent to confuse the counsel and force this settlement (Pet. brief in the Court below, pages 38-39) and they show that Respondent has

just set down whatever figures he thought would force a settlement. It made no difference to him what figures he put down as none of his figures were based on any audit, tabulation, calculation, analysis, count, inquiry or list (Pet. 20a-64a.) and Respondent refused to give Petitioner or the counsel any information or list showing how he arrived at any of those estimates (R. 34, 36, 37.) (Pet. 50a, 51a, 56a, 57a, 61a.)

Petitioners have pointed to Respondents own testimony in the record to prove that:

1. Petitioners reported all of their gross income in the income tax returns they filed. (Pet. 31a.)
2. Petitioners reported all expenses clearly and in minute detail (Pet. 21a-31a.)
3. Respondent testified that he found 95 per cent of all expenses "were allowable and they were allowed" (Pet. 63a.)
4. Respondent made no audit, tabulation, calculation, count, list, inquiry, or even any attempt to analyze the items (Pet. 5-8.)
5. Respondent forced this "arbitrary" settlement on counsel without any audit, tabulation or list, on his stated basis of "We take the total sum and apply in what in our judgment is a reasonable figure to apply," and did this fourteen years after the returns were filed (R. 35.) (Pet. 56a.)
6. Respondent forced the settlement by fining and imprisoning Petitioner and placing liens and attachments and seizing and taking all of Petitioner's property and money and leaving him with no property or credit or money with which to pay his counsel any fee for further contesting the case (Respondent's brief in opposition to this petition, page 4.)

7. Respondent testified that he never made up any list of the items on which he would have had to base any assessment (R. 53.)

8. Respondent admitted that he made mistakes in the application of the money he seized in each and every one of the years (Respondent's brief in opposition to petition for rehearing in the Court below, page 12.)

9. Respondent has already returned some of the money he seized and took in this case which shows a laxness which this Court should not countenance, especially when the Respondent was applying "terrific pressure" (R. 51.) to force the settlement. (Petitioner's reply brief to petition for rehearing in the Court below, pages 19-20.)

10. Respondent's agent who prosecuted this case for over seven years stated that he began the case by working late in the night to "supplement the family income" (Pet. 20a.) and he testified falsely (Pet. 35a-41a.) and the Acting Assistant Commissioner who closed the case also gave false statements about the facts. (Pet. 49a.)

All of those things were done to force the signing of the stipulation for the decision in this case. Proof of them is all in the testimony of Respondent in the record. Petitioners ask this Court to please review this case and issue the proper order disapproving this method of assessing taxes and penalties.

ARGUMENT

The record in this case is made up entirely of Respondent's quoted testimony which shows that Respondent has not, and he cannot, legally assess any taxes and penalties as he has assessed these taxes and penalties. Respondent has admittedly made no audit,

tabulation, calculaion, list, count or even any estimate of the number of tems he claimed to have disallowed for the assessmen of these taxes and penalties. He has just set up a dozen different sums, based on his "assumptions", wthout inquiry, and he has used those sums as the basis of his assessments, attachments, liens and the seizure of all of Petitioner's property and money. Respondnt has secured a fine and imprisonment of the Petitoner on the basis of his "assuming" that Petitioner had some net income (Pet. 45a-46a.) and on the basis of that "assumption" he opposed the release of Petitioner from prison after Petitioner had served enough tine in prison to become eligible for parole on the ground that Petitioner had not paid the taxes he might propose to assess.

Respondent then applied "terrific pressure" for the settlement of thecase by the signing of a stipulation by Petitioner's counsel who was appearing in the case only on Respondnt's approval as Respondent has a rule that no counsel can represent any taxpayer without his approval Thus any counsel, if he hopes to continue to reprsent taxpayers before the Bureau or the Tax Court must submit to the wishes of the agents of Respondent and serve them before the client.

In this case the Respondent had the counsel sign the stipulation and hen took over the counsel and had him testify as his witness against Petitioner before the Tax Court. (R. 41.)

Respondent testified that he found from the books and records and returns that Petitioner had reported all of his gross income in the income tax returns which he filed. He alsofound that all expenses were reported in the greatest detail. The returns were complete and complied with al of the requirements of the Internal Revenue Code.

Respondent also testified that he found that 95 per cent of the expenses were allowable and they were allowed (R. 14.) (Pet. 54a.) and the books and records kept and delivered to him showed that the other 5 per cent of the expenses were recorded in so much detail that he did not audit, tabulate, calculate, list or count them. He just estimated the number of items he proposed to disallow for the assessment of these taxes and penalties to be somewhere between 3,000 and 30,000 items, "and realizing the enormity of attempting to analyze some 20 or 30 thousand individual items I told them that we would adopt the theory of the Cohen rule and split it down the middle" (R. 27.) "And I said "Split them down the middle". Let us get rid of the case" (R. 39.)

Petitioners argue that this is not the proper way to assess any taxpayer's taxes and that this decision based on this method of assessment does not comply with the requirements of the Internal Revenue Code, or any code of justice.

Petitioners argue that no taxes and penalties were properly assessed in this case and ask this Court to so rule.

CONCLUSION

Since Respondent's testimony shows that Petitioner reported all of his gross income and all of his expenses and that 95 per cent of those expenses were found to be allowable and were allowed and that the other 5 per cent were never tabulated, listed, counted or analyzed. And since this has been repeatedly testified to by Respondent there is no basis for any legal assessment of any taxes and the settlement forced upon the counsel in this case should be set aside and dismissed.

The Supreme Court of the United States is the only court which can protect Petitioner and other taxpayers

from the arbitrary and bureaucratic actions of the Bureau of Internal Revenue.

The Supreme Court should consider this case as it is the only place where a person's life, liberty and property can be protected against such arbitrary and capricious actions as those here set out in Respondent's own testimony. The lawyers in the Solicitor's Office have taken a narrow, technical and legalistic position in their brief in opposition. Perhaps they felt they could do nothing else as the injustice of the treatment of Petitioner by the Bureau of Internal Revenue cannot be supported in good conscience by any reasonable men.

All citizens are entitled to expect justice and fair dealing from the Bureau of Internal Revenue and if the Bureau refuses to be fair or just as shown by the testimony in this case then the Courts, and especially the Supreme Court of the United States should give justice.

This case should be heard in open court before the Justices of the Supreme Court and thus give notice to the world that in the eyes of the Supreme Court a citizen stands in the same position as this Bureau of the government and that a citizen can have the ear of the Supreme Court when he shows that an injustice has been perpetrated, even though that injustice was done by agents of the government itself.

Respectfully submitted,

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